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Notes on Law
taken from the Lectures of
The Hon^ble Tapping Reeve
and
James Gould Esquire
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Containing the Law
relating
Real Property

# Real Property. by Mr Gould.

Things, as that word is used in law, are the subjects of property. They are divided into Real and Personal.

2. Bl. Com. 384, 387

Things real are such as are permanent, fixed, and immovable, as lands and tenements. And all other things are personal. Fixtures are made platels according to the rule &c.

Co. Lit. 18. 2. Bl. Com. 24.

Things real are said to consist of lands, tenements and hereditaments. The word "land" includes all things of a permanent and substantial nature. "Tenement" strictly means things of a permanent nature, which may be holden whether corporeal or incorporeal. Lit, Hereditaments, in a general extent. The word "hereditaments" is still more general in its meaning, and includes whatever inheritance may be inherited, whether it be material matter, personal or real.

Co. Lit. 6, 19, 20. 2. Bl. Com. 17.

Co. Lit. 2. 2. Bl. Com. 17.

Hence an heirloom is an hereditament, though clearly personal. For it is only some chattel which, by custom, is made such.

And it may be remarked, in general, that all these words are descriptive of the subject in which an interest may be had and not of the quantity of interest or estate.

Hereditaments are of two kinds, viz. corporeal

Corporeal and Incorporeal hereditaments

all and Incorporeal.

Corporeal hereditaments are all of permanent, and substantial nature, all which are comprehended under the term "land" which includes not only the soil, but all a mass, house and buildings upon it.

Co. Litt. 4. 2 Bl. 18

An action will never lie to recover a proportion of water, eo nomine; it must be ascribed as so much land covered with water. Because in water, one can have but a transient and fluctuating interest. Land also has an indefinite extent, upward and downwards. Hence if C. erects a building, so as to overhang the land of B. B. may have an action though his land

Co. L. 4. 5. b. 2 Bl. 18

not touched by the building: and for the same reason a conveyance of land carries all the minerals and forests upon it. Tho' these may all be conveyed by their appropriate names without conveying the land except in the case of water. By a grant of water eo nomine, nothing passes but the right of fishing.

An incorporeal hereditament is a right springing out of, annexed to, concerning, or exercisable within, a thing corporeal: as a right of common, or way, but it must be a right of C. B. has no interest in the corporeal land over which he has a right of

Incorporeal hereditaments

The same is true of rents which are an incorporeal hereditament. Though the manner, in which it is paid, is corporeal. For the reference to land is incorporeal hereditament. See 2 Blackstone.

Right of Common, is a right of profit, which one has, in or upon the land of another. This profit has a right, by custom or otherwise, to exercise his cattle upon the land of another. He has a right of common, and an incorporeal hereditament. And so, also, he has a right to fish in the waters of another.

The rule, as to water navigable, and not navigable, is different. In a navigable river the right of soil is prima facie in the Crown or public, or state: But the right of fishery is common to all the subjects (prima facie). In a not navigable, however the right of soil and of fishery is exclusively in the adjoining proprietors. Each of the adjoining proprietors owns to the middle of the river or channel.

But the right of soil in a navigable river as well as the right of fishery, is property of a private citizen.

The same distinction exists in respect to the case of navigable rivers applying to the ebb and flow between high and low water marks. The right of soil is prima facie in the state, and the right of fishery is common.

2 Wh. 20
Co. Lit. 4.20

2 Wh. 22.

4 Wm. 2164.
Ringgold 420.
2 Rob. 170.
1 Mod. 105.
6 St. 7 R.
Salk. 357.
4 S. R. 45.
2 Black. 70.

5 Pa. 157.
2 Wh. 20.
2 Pa. 20.
2 Black. 70.

2 Black. 70
Co. Lit. 122
Co. Lit. 4.
2 Black. 70
Co. Lit. 4.

But when a grant is made to an individual of land which is bounded by the sea, I apprehend the rule to be that his right extends to the low-water-mark. But this does not bar the exclusive right of fishery, or even of taking shellfish, for these rights are common.

Estates, in lands, tenements, and hereditaments are the interest which the tenant has in them. Thus if a person owns all his estate in land, he has all the interest which he has in the subject, is transferred. This word "estate", has a peculiar meaning and is applied to the interest, in a certain interest, thus if a tenant, in fee simple, assigns all his estate to A. for life, it does not bind all his interest in the subject is not transferred, for he reserves the remainder to A. in fee simple. A has here and the same special meaning the word bound be found in conditions and.

Fee simple is an estate in perpetuity, is inherited by its successors. Hence the remainder in fee simple of Estates is into Estates of freehold and Estates not of freehold, not in order to avoid and to the succession, and must not be to the transfer of the subject.

A freehold estate is one to the convenience of a person, divine of service is necessary, at a common

Co. Lit. 345
2 Bl. 103
1 F.R. 411

1 Rep. 224
2 Bl. 103
1 Co. 415
2 Bl. 335 note
3 Rep. 4.

2 Bl. 103-4.

except in case of incorporeal hereditaments such as Lib. Ty. § 59.
for these are in their nature intangible and 2. Bl. C. 104.
incapable of being seized. This is the true and
ancient original feudal estate.

Estates of freehold are either Estates of
inheritance, or not of inheritance.
Estates of inheritance are divided into
Inheritances absolute, and Inheritances
limited.

I. Of the Absolute Estate of Inheritance.

These are, I have observed, either absolute, or
limited. An absolute Estate of inheritance Lib. § 1.
is an estate which one holds to him and his
heirs for ever, generally, and absolutely
without restriction to any particular heirs.

The word fee has the same meaning in law
with the word feudum or fief, or corrupted into
feoh, which signifies an estate which
one holds in his own right, and of no superior.
A fee on the other hand is an estate holden of
some superior, in whom the ultimate property
resides. Now in feudal theory the allodium
or absolute property is in the King
the highest feudal lord which a man can have in
a country.

In Bracton's time, it has been so regarded, but
in modern times it is not and his views are untenable.

## Freehold Estates of inheritance.

Co. Lit. 1. b. [illegible] [illegible] [illegible] in fee an estate absolute, [illegible] is said to be seised.

The word fee, however, is sometimes used in 2 Bl. 106. its original signification as to denote the continuance, or quantity of estate. It then signifies an estate of inheritance, and when used without any adjunct, or used with the word simple, it is used in contradistinction from a fee conditional or fee-tail.

The word fee, however, means the same as the word fee simple. If a limited fee is intended, that must appear by other words.

2 Bl. 107. The fee simple [illegible] [illegible] inheritance, and cannot be in general be in abeyance or in nubibus (that is, in remembrance of the common law). Consistently with this rule however, there may be several estates carved out of a fee. For instance lands to a man for life, or years, with remainder in fee[illegible] [illegible] (as in this case) the fee was not transferred.)

2. Bl. 107. cont. [illegible] Judge Blackstone however says (2 Bl. 107) that if a conveyance is made to a particular estate of freehold with a contingent

Fearne 275. 285-6. 257. 373 remainder, that remainder is in abeyance. But it is now well settled that the remainder continues in the grantor until

Freehold Estates in fee simple.

The contingency happened, and if the devisee died before the contingency happened, the fee descended to his heir, and held to be accelerated, on the happening of the contingency.

2 Bl. 197

There is one precedent, on this subject, which does not seem to be well established.

Litt. 646. 2 Bl. 197.

Littleton & Fadherby in the ancient book of the conveyance is made to a corporation sole and the successors, on the death of the first the freehold is in abeyance. But contingent the succession is entitled to all the rents & profits from his death, and it would seem therefore, from the retroactive operation of the law, as if the estate was considered as vested in him from that time.

## Mode of Creating or passing a Fee.

With regard to the creation of a fee, or the reversal of it there are several rules of feudal origin to be observed.

To keep a fee, or any estate of inheritance, the word "heirs" is indispensable; and however clear may be the intention, a fee cannot be kept without this word. If then a grant is made in these words "I give, grant, &c to A forever" he takes only an estate for life; and so, even if the words are "to A in fee simple" an estate for life only passes. These words of inheritance are always

Of creating and passing Estates of Inheritance

L. & C. 2 Wms. 561 — necessary the words "heirs" without words of perpetuity, is, however, sufficient.

The word "heirs" when used in this form, is a word of limitation, and not words of purchase, or description. By this is meant that the words "his heirs" are not used as descriptive persons, who are to take after the decease of the first grantee, but only to denote the quantity of interest, which he himself shall take. If granted to A. and his heirs, does not make the heirs concurrent, or joint tenants with him, but only a fee to A. If the word was considered as a word of purchase, the heirs would be considered as purchasers, and the grantee only for life.

Doe v. Cox 2 B. & Ad. 108 — But the rule that an estate of inheritance cannot pass by grant, without the word "heirs," does not happen in the case of corporations. There a more liberal construction prevails, and the intention may be inferred from other words, or from any other source, if it will be found that a more liberal construction prevails with regard to corporations. They were formed by grants, from convenience, and come into use when the C.C. were more liberal than now. Thus if A. covenants his estate to B. in consideration B. will take a reversion, tho' the word "heirs" be not used.

so also of land is accounted to be, but even this
shall be construed to pass an estate of inheritance
for this was also in the intention of the devisor.

But if an devises lands to a friend his a-
gents, without words of perpetuity, a fee will
not pass, for such an intention does not ap-
pear. If one however devises to another
"all his estate" (having a fee simple himself)
he devises such the a freehold. For, denu-
ans, the word "estate" accounts the whole of the interest
and which one has in an subject.

Some opinions have taken a distinction be-
tween the words "all my estate," and the words
"all my estate in N;" and have contended that
the words in the latter case, are merely descrip-
tive of the subject, and not of the interest. But
according to later opinions, this distinction is
not supported.

There is however one particular case in which
the question of construction does not appear to be
settled — as where the words are "all my estate
in the occupation of N." For if no
no property be said to be in the occupation
of the fee simple, and of no, the words will
not apply to the subject. This is still a question.

In the words "all my estate real and personal"
in a devise it has been held that the will passes

2 Bl. 581
1 Mk. R. 672.
4 Bur. 2579.
2 Bl. C. 108
Cowp. 47.

Salk. 236
Coup. 589.
12 R. 412.
2 Sk. R. 567
4 Sk. R. 99.
5 Sk. R. 569.
6 Sk. R. 84.
6 T. 592.
1 H. Bl. 283.
2 H. Bl. 444.

2 Atk. 37
1 Ves. 228
Coup. 355.
2 Ba. & Be. 524.
2 Ves. 514.
1 Sk. R. 411.
Coup. 306.

1 Ves. 228 &

Coup. 247
5 T. 95 &c
1 Ves. 93.
2 Atk. 78

Of Creating & Passing Estates by Inheritance.

Br. Ch. 417 — So also under the words "all a man worth," in a devise, a fee has been holden to pass.

8 T. R. 66.

5 T. R. 558. — But the words "heirs of his body" do not pass a fee,

3 T. R. 356 — carry an inheritance, for that would divert

6 T. R. 175 — the entire and not the interest. Hence, if one

8 T. R. 497 — devises "all his inheritance" to J. S. J. S. will take

1 B. & P. 550 — only an estate for life. But a devise in these

2 N. R. 221 — words: "I give to J. S. and my heirs, heirs male,

Doug. 39. — 1 Str. 182. — Bur. 268. — 5 T. R. 376. — 1 Ball. 37.

special, carries a fee, for the word heirs is considered as serving the purpose of ~~a description~~ of the interest. Hence the word issue, through a mistake, means children, the intention is an implied, not the express.

These examples, all form exceptions to the general commandment of making conveyances, for a man making a will is supposed to be in extremis, or in articulo mortis. But if in a will one devises "all his land" to J. S., without any other words, only an estate for life will pass, for this word is well acquainted of the description of land, if however one devises "all his land," and he possesses a freehold, or freehold and leasehold, the word land will carry the fee in consequence of the change to the revenue otherwise be a loser. The rule in this case is essential a clause is for the benefit of the revenue.

Co. 16 — 2 N. R. 343 — Rev. Dec. 502 — 3 Bur. 1623 — 3 T. R. 354 — 1 B. & P. 30

## Of Creating or passing Estates of Inheritance.

The fee, here does not pass by reason of the operative meaning of the word "bind", but only by reason of the condition. And therefore if a bond 6 Co. 16
be given "to bind to" A. B. in penalty a sum Cro. 279
equal to the profits of the land, an estate passes 2 Ch. R. 141.
well perhaps. For in the condition, the obligor 5 Bac. Ab. 87
covenants to make a lease, in any event, and is necessarily bound to the amount of the profits. There is no reason therefore, for taking this case out of the general rule.

A devise of land of a certain annual value 6 Co. 16
the obligee paying an annuity of A. B. 5 B. R. 13
annual value passes only an estate for life, for 3 Term 524
the same reason as in the last case. 16 Ves. 2 Atk. 384.

For the purpose of accelerating the enjoyment of the legatee, or to avoid the introduction of an act, or for ex: if it is come at to commence "at all my estate &c". But then 7 Term 5.
general introductory words will not alone pass 4 Bac. Ab. 87
a fee unless there is something in the body of 3 Ch. R. 274.
the will which indicates such an intention. There 3 R. 5.
general words may be of importance upon a doubtful question of intent, however.

[illegible]

# Of creating and passing an Estate of inheritance.

1 Vn. Ch. 6
2 Ch. 229
7 Bro. 94

The statute uses the words "heirs" in a sense different from that in which it is used in common language, and in consequence to prove it. This gives, with regard to the rule in the case of annuities.

There are some other exceptions to the general rule. The word heirs is not necessary in a gratuitous conveyance, by fine or recovery, for these modes of conveyance partake in operation of them.

2 Bl. 90
Bl. 4-7

So also, in grants of land, to a corporation the word "heirs" is neither necessary nor proper. The word "successors" however is necessary.

But in a grant to a corporation or corporate,

7 Vn. 6. 424
2 Mod. 104

neither the word "heirs" nor "successors" is necessary to pass fee. For, if such a grant were considered as conveying an estate for life, another act as a corporation never dies. It would be tantamount to a fee and last forever.

And on the same principle in the (11) is a grant to the King the words heirs or successors are not necessary, for the King never dies.

The word "heirs" therefore is properly a word of limitation and not of purchase. That is, it is a word descriptive of the quantity of estate granted, and gives a fee to the first grantee. Suppose an estate is limi-

to B for life with remainder to his
eldest male heir of his body, and
his heirs, and then to his heirs in tail
and so in the same. and not to confer on
the first living male a fee for life.

A devise upon a devise is made to A for
life remainder to B for life, remainder to the heirs
of the body of A. A takes, and dies, B survives
and takes the remainder for life, and
must then be for the reception of that remainder.

But the subsequent remainder vested in interest
at the creation of the estate, in the fee
example A and B both in interest and
possession.

Hence and applies to the case of a devise
to A and the heirs of his body. A takes
in such a manner as a partial to do in the
case of an intermediate remainder.

These examples are strike the mind as being
governed by arbitrary rules. But if the word
"heirs" were to be considered as a word of purchase
and not of limitation, a fee would never
estate in fee simple can ever be created. For if
you allow the word heirs as a word of inheritance,
the ancestor would take an estate for
life, for, converted of its technical power, & would
only mean, to A for life and to his children."

27-42-6
89-92.
90-92.
191-197.10.
105-294.
1 Bo. 95. 104-
11 Bl. 9. 6.

Import of the word "heirs" &c. in Conveyances.

And whenever a general and a particular intent cannot stand together, the general intent is to be preferred. Indeed it seems that if the word "heirs" were to be construed as a word of purchase, the general intent of the grantor would be defeated. There were some plausible reasons, on that the Land would be wrongfully of his price on the account: but these reasons now seem to exist.

"Heirs" being regularly a word of limitation, a devise to "the heirs of A," conveys no estate unless A dies before the testator, for "nemo est hæres viventis." However, from some other

2 Saunders 313 Fonb. R. 532 Cow. 317

Ray. 230 2 Saunders 313 1 Salk. 421 2 Ath. R. 1010 2 Ath. 1100 1 P. Wms. 229.

reasons in the instrument it appears that the word heirs was used as a word of purchase, the heirs may take as purchasers; as if the devise be to the heirs of A, now living where clearly the heirs apparent are intended.

An estate given to "one and his heirs," cannot be qualified and abridged of some of its good incidents. Thus, after such a devise a provision that the devisee shall not devise his estate, or receive it, is void as being inconsistent with the nature of the estate.

2 L. 13. Dowl. 329. 8 P. R. 61.

I have already observed that freeholds were divided into the holds of inheritance and freeholds not of inheritance: and that the former were either absolute or limited. I am now to treat of limitations.

Fee conditional at Common law

Limited fees are such estates of inheritance as are clogged with conditions or limitations. There are often cited 1st Qualified or base fees, and 2. Fee conditional at Common law. By the Stat. de donis, those fees have almost all been converted into fee tail. 2 Bl. 109.

A base fee is one which has a qualification annexed, and which must determine, when that qualification is at an end. As if a grant is made to A and his heirs tenants of the manor of Dale, the determination of their tenancy determines the estate. 2 Bl. 109

A fee conditional at Comm. law is one which is restrained to some particular heirs of the grantee, as the heirs of his body, or the heirs male of his body. A fee simple, on the contrary, is limited to no particular heirs but goes to the collateral as well as lineal heirs.

These limited fees are called fees-conditional at common law because of the condition implied, that if the grantee should have no lineal heirs, the estate should revert to the donor. See the case of the conditional gift of the grandfather. These conditions were considered as performed, and the estate absolute from the birth of the issue for these purposes. 1 To enable the grantee to alienate. 2. To enable the donee to forfeit for his offences and 3 To enable him to surrender it

Hard. 241

2 Bl. 109.

Co. Lit. 19. 2. Bac. 230. 2. Bl. 111. so as to bind the issue, in the hands of the issue.

But on the other hand, though the provisoes had issue yet if he does not alienate the land and his issue ~~[illegible]~~ and die before him, then the land on his death reverted to the donor. For, from the terms of the grant, the land could never descend to the heirs of the grantee's body, and therefore must 2. Bl. 110. revert. It is to be observed, however, that if the original grantee died leaving an issue the estate became absolute in that issue.

In consequence of the construction of these words by the Co. & the Stat. Westm. 2. called the statute de donis conditionalibus, was passed for the purpose of restraining the alienation on behalf of issue. The Stat. enacts that the will of the donor shall be observed and the estate descend to the issue if there be any. This clause prevented the alienation from disinheriting the issue, and the consequent clause respecting the reversion on default of issue, was made 2. Prem. 170. 2. Bl. 116. for the protection of the donor.

2. Bl. 112-13 Bac. Ab. 820. The construction of this statute was, that the estate given to a man and the heirs of his body, was to be divided into two parts; the first they called a fee-tail, which was the particular estate: and the ultimate fee simple, which we now call a reversion, expectant on failure of issue. The judges considered an estate in the donee.

An estate tail therefore was entirely the creature of this Statute.

But this Statute did not convert every fee conditional at C.L. into an estate tail, for the words used to denote the subject, is the word "tenement", which does not include incorporeal hereditaments not savoring of the realty. These therefore may, at this day, be limited as fees conditional at Com. Law, but no other. Every other subject is included in the word "tenement" in the Stat. as meaning land or anything of the realty, but only changes the person, and therefore is limited to one and the heirs of his body, is a fee conditional at Com. Law, and if issue is born, is alienable by the donee after issue born, and has no reversion.

A mere personal chattel cannot be entailed, nor, if granted to one and the heirs of his body, will it create a fee conditional at Com. Law. These are subjects which are not properly adjudged of a freehold estate, such as rents, or an inheritance of a copyhold estate, or a fee laid down by custom, or a term for years, and the heirs of his body, in a chattel, shall take the absolute and unqualified interest in the subject.

But there is one subject which cannot be entailed, a chattel interest, as a remainder, or in a

Co. L. 19, 20
1 Mod. 41
2 Mod. 113
1 Wms. Ch. 325

Co. L. 20.
2 Bl. 174
Bac. Ab.
10 Co. 7.
8 Co. 45
2 Bl. W. 259
2 Com. Dig. 342

personal chattels, may be limited over, after an estate for life, in an executory devise; by words which in the case of real estates, would create an estate-tail, by implication. Thus if a chattel-lease is limited in a devise, to A, and if the grantee dies without issue in the life-time of B, remainder to B, this will be a good remainder to B, though, in real estates, the first grantee would take an estate-tail by implication. This example anticipates the rule, that in a devise an estate tail may be created by implication, tho' in a deed it cannot be.

Vin. Ab. 663
3 P.W. 259
1 E.R. 593.
1 B&C R. 215.

2 Bl. 115. 381.
Fearn. 170-300
7 E.R. 89.
9 Co. 127.b
1 P.W. 605
3 Atk. 398
Comp. 234.

So also, if a devise is made to A and his heirs for ever, (which words when unqualified, would give an estate in fee-simple,) and if he dies without heirs of his body, to B, A takes an estate tail: for the penalty of the first word are restrained by the latter clause, which exhibits the devisor's intention. But an estate tail cannot be thus created by grant.

Fearn. 170 301. 2
7 E.R. 276

It has been settled that if land is limited to A and his heirs forever, and if he dies without heirs, remainder to B, this will be an estate tail in A, provided B is a collateral heir to A. Otherwise it will not. The reason is that since B is a collateral heir, it is manifest that the word heirs was not used to create heirs general.

Comp. 234
5 E.R. 337
3 E.R. 145-6.
8 E.R. 5: 211.

# Creation of Estates tail.

Estates tail are divided into general and special and these into tail male, and tail female &c. For these, see 2 Bl. Com. & Co Litt. 1 Bl. Com. 110 & 2 Co Litt. 20 b & 21 b

An Estate in tail male is limited to a man and the heirs-male of his body. In estates in tail male, the ancestor must be ascertained wholly upon male. And so conversa, in tail female. 2 Bl. p. 24 Co L. 25.

If therefore an estate is limited in tail male and the donee has issue a daughter and this daughter a son, the son cannot in strict law be said to be a direct heir of inheritance thro' her mother; but as the mother could in strict law be said to have no heir of her body.

As the word heirs is necessary to create an estate in fee simple, so a particular kind of heirs, as the word body, or some word of procreation, is necessary to create an estate tail, for otherwise there is no particular class of heirs mentioned, and then you the Lord would take. If then, either words of inheritance, or words of procreation are omitted in a grant, an estate tail will not pass. Thus if an estate is limited to A, and the issue of his body, the word heirs being omitted, a fee will be created in the person. And so also, if an estate is limited to A and his children, an estate tail will not pass.

On the other hand if words of inheritance be used in 2 Bl. Com. p. 114 - 281.

Under restrained by any other words, than words of procreation. These restrictive words can still have no effect. If then an estate is devised to A & his heirs male, the grand paper a fee simple descendible to all the heirs general. These words do not create an estate tail, for there are no words of procreation; and the law will not al-
Lit. 31. Co. L. 27. 96. low an estate to be created, which the common law had no name for. The reason why an estate
5. E. R. 338. 2. Vl. 115. 121. in fee is supposed by such a devise, is that the grand is to be taken most strongly against the grantor.

Such a grand however in Eng. by the King cre-
5. E. R. 338. ates no estate, for the rule of construction which was last mentioned does not operate against him.

But a devise, created in these terms, would cre-
2. Vl. 98. 5. E. R. 338. ate an estate tail; because thereby the intention of the devisor is expressed, and no one be inferred from any words which manifest that intention: that it is otherwise expressed. Thus there is an example
1. Ch. Ca. 49. 2. Vl. 115. of a fee tail being created in a devise without words of procreation; and on the other hand a fee tail may be created by devise, without words of inheritance.

Thus it has been holden that a devise to a man and his seed, creates an estate tail &c.

So also in a devise of the same nature of land is devised to a man and his children or issue a fee tail paper, if the grantee has no children then in esse.

Clearly the intent is that the children shall take, in same way: and if an are and issue, at the time they cannot take concurrently with the father. The devise is immediate, and not by way of executory limitation: they must take the fee as heirs of the body.

But when a devise to A and his children, he having children at the time, they shall take an estate for life, as joint tenants or tenants in common by moiety with him. And if it is observable, that if some of them are after-born children, they cannot take. The existence of children and the time, rebuts the presumption that the devisor meant to create an entail &c.

But if a devise is made to A and after his death, to his children, he having children at the time A takes an estate for life, and they a remainder for life and not an inheritance. The word "children" is, prima facie, a word of purchase and not of inheritance. In this case however the after-born children will take as well as those then living, and even a posthumous child.

Take the rule to be the same, if a devise is made to A and after his death to his children, he having no children at the time. If the devise had been to A and his children, it would mean and be construed that they could take only at the time.

1 Roll. 837.
2 Vent. 227.
2 Ld. Raym. 821.
1 Burrow 219.
Dougl. 306.
3 Burr. 1709-12.
1 B. & P. 481 & 482.

6 Co. 16.
7 Co.
Cro. Eliz. 743
Cow. 814
1 Strey. 114.
1 Eq. Ab. 262.

Cowper 8.
6 Co. 16.
Co. Litt. 9. a
2 Vern. 545.
Wms. 9.
Dougl. 509.
314.
2 Rom. 545.

# Incidents to Estates tail.

1 Co. 76 b. Bac. 54

From the words of the tenant in tail, in this case, it is plain that the reversion continued the fee-simple of Christian.

1 Saund 24 b n 3. 2 P. Wms 4 Burr 35

If an estate is limited to A and his heirs-female of his body, his female issue will take as effectually in tail as if the words were, male or female, his heirs. They come within the description of heirs-female. It was formerly holden, that if an estate tail was limited to the heirs female of A as purchasers, and A had issue, the issue might not take. This rule is now however obsolete.

Co. Lit. 104 a. n. 2 5 Mod 2615 1 Ford 422. 5 Rolle 386 2 Bl. 1

Co. Lit. 1 Co. Ent. Fo. Hob. 22 b. 2 Brank. 53. 2 Co. 27 b. Rolle 29.

The Incidents to a tenancy in tail are: 1st that the tenant is liable for waste. 2d that the tenant in tail is entitled to recover. 3d that the tenant in tail is entitled to a tenancy by the curtesy. 4th that the estate may be barred, or in tail may be barred in a fine and common recovery, or by a bargain and sale with a proper account.

Co. Lit. 1 Rep. 138 2 Bl. 348-54 Co. Litt. 29 a n. 7 2 Bl. 360-3.

The tenant in tail to bring a fine or suffer a common recovery is independent from the nature of an estate tail. It therefore an estate tail is limited with a proviso prohibiting the exercise of the power, such proviso is void. There is never in tail, unless in a fine or

1 Co. 103 a. 2 Co. 61 b.

only, the crown estate tail; for it is provided by our Stat. that the estate tail shall become a fee-simple in the immediate issue of the first donee in tail. This was precisely the case with a fee conditional at common law. Pl. 8. 43.

## Freeholds not of Inheritance.

Freeholds not of Inheritance are estates for life, or lives; and this is the lowest species of real property. A term for years, however long, is only a chattel interest. These life estates are either conventional, or created by compact; or are created by act and operation of law.

Conventional estates for life may be for the tenant's own life, or for the life of another, or for any number of lives. In the latter case, the estate continues, tho' the life of the survivor of all the lives be gone.

Legal freeholds are only created for the life of the tenant. An estate pur autre vie, is therefore always created by the parties. An estate pur autre vie may, it is conceived, continue longer than the life of the tenant. In such case it is a rule of law that if the estate pur autre vie was limited to A and his heirs, the heirs shall hold during the life of cestui que vie as occupants. But if there was no such limitation it was formerly open to the first occupant.

# Creation of Estates for life.

2 Bl. R. 120 But in Eng. by Stat. 29 Ch. 2 a tenant
2 Ch. 156 is empowered to devise the residue of his estate on
Bac. 41. his death and if no devise is made provision
2 Mk. 258-60 is made for distribution of it to his representatives.

In Penna. we have no Statute. It may perhaps be questionable whether in this State such an estate is devisable? It appeared however, it is: for the words of Pa. are "lands and all other estates," whereas the Eng. Statute of devises mentions only "fee simple".

But if it is not devisable, the question may arise relative to the manner in which it is to be conveyed. Though Conveyance would avoid the difficulties of the Exp. statute.

Cr. C. 159 An estate for life, being a freehold, cannot be created or passed and Com. Law, without livery of seisin.

(Of course from friends, kinsmen, and neighbours, not requiring an express grant of letters) hence an estate for the life of the
30 Ch. grantee: for he shall always take the land or
Bac. 242 2 Mk. Ch. that he can take, in case the words of the grant are sufficient for terms of life, generally, an estate for the grantee's own life is passed.

This estate, except an estate of inheritance, alone is, or has sufficiency, which has a determinable limit, and is an hereditament, land

during the life of the tenant, is an estate for life; as an estate limited to a woman during widowhood or to one, till he shall marry, or till he shall leave the realm. 5 Co. 20. 1 Salk. 42. 2 Mod. 121.

The incidents to a life estate are principally these. 1. Had the tenant, if not restrained by the express grant, power, as tenant for life, to take reasonable estovers as wood to burn, or to repair instruments of husbandry, necessary fences &c. But he has no power to cut timber for other purposes. If he does, he is liable to forfeit his estate, and is taken in mainpernor. These reasonable estovers are supposed to be necessary for the enjoyment of the estate, or for its holding on. Co. Lit. 41 b. 53. 2 Bl. 35. 122.

2d. A tenant for life is not to be injuriously diminished the estate, except so far as it is necessarily diminished by his occupation. Hence if he sows after sowing and upon harvest, his personal representatives have the right of ingress and regress, to take away the crop or emblements. Co. Lit. 55 b. 2 Bl. 123.

This respects those crops only, which are raised by annual labor. So it is, if the tenant holds an estate for years, and the latter dies.

The rule is the same when the estate is determined by operation of law. Thus if an estate is limited to husband and wife during coverture, and a divorce

# Incidents to Life Estates.

5 Co. 16 A mutuo matrimonii takes place by act of parliament, the husband has a right to the emblements.

But on the other hand if the estate is said to be at the act of the tenant, he himself right to compensation,

Co. Lit. 55. 2 Bl. 122. of the emblements so with the crop; as, if he commit waste, and thereby a forfeiture accrues; or if a tenant during widowhood, marries, she shall not have the emblements.

Qd as to undertenants, or lessees of tenants for life, they have the same, and in some cases, precisely

Co. Lit. 55 1 Bl. 747 2 Bl. 124 upon, regarding the emblements, than the tenants for life, themselves. Thus if tenant during widowhood marries her husband shall not be entitled of her emblements, unless the husband marries her himself.

Lord, and Coke, an undertenant upon the death of the tenant for life, leave the premises, and secure the profits of the land from the landlord.

It is a general rule, that where rent is payable on a particular day, if the tenant dies before that day, and is not apportionable, and Coke on Lit.

10 Co. 127 2 Bl. 24 But now by Stat 11 Geo II. the undertenant is obliged to pay pro rata; the rent is to be considered as apportioned.

Lord if it be a tenant for life, that is, if he is entitled for years, and dies during the term, the rent is determined on his account, unless contained

Tenant in tail after possibility of issue extinct.

in the reversioner. For as a gift of the latter no larger estate than the original tenant held, could be made by him, created. Lit. § 516. 2 Rac. 397. 2 Rph. 105. Cow. 482. 1 T.R. 86.

## Estates for life by Operation of Law.

Life estates created by operation of law, are of three kinds 1. A tenancy in tail after possibility of issue extinct. This estate arises when an estate in a female tail has been created, and the person from whom body the issue was to spring has died without issue, or having issue, it has become extinct: and in such case the tenant becomes tenant in tail after possibility of issue extinct. For from the moment when the wife dies, the possibility of an inheritance ceases. Lit. § 32. 2 Bl. 124.

Though this was, originally, an inheritance, it has now become an estate for life. This estate cannot be created by grant, but must arise from the death of the person from whom body the issue was to arise. If then an estate is limited to A. and his wife and the heirs of their bodies begotten, and afterwards, or even as it is obtained, they have an estate for life, though not this estate: for the law always supposes the possibility of issue to exist, until that possibility is extinguished by the death of one of the parties, however early or late may be their age. Co. Lit. 28 b. 2 Bl. 125.

This estate is of a mixed nature. In modern

respects, it is like an estate for life, and does not bear all the incidents of an inheritance.

It is like a tenancy for life, in that, an alienation in fee, occasions a forfeiture; but like an estate in tail in fact to an inheritance. The tenant of it is not punishable for waste. But if such a tenant cuts timber, the property, when cut, is not his, and belongs to that person, living at the time, who has the first estate of inheritance in the land.

2 R.S.W. 241 2 Bl. 125 But as the remainderman must be living at the time of land is limited to A in tail, remainder to the unborn sons of B, remainder to C, C being the first living remainderman, shall be entitled to the property. For as the timber, when cut becomes personal property, easily removable and subject to access, it would be impudent to suffer the property to rest altogether in contingency.

2 Ch. 26 323. In all other respects however than the consequence aforesaid, the tenant of the tail is strictly a tenant for life.

R. A. Chase & Crosby of the second & 4th is called a Freeman in the curtesy at Epsom & Ewell. When a man marries a woman seized of an estate of inheritance, and has issue by her capable of inheriting the inheritance, he becomes entitled to the curtesy of her lands. It is known from the 1 Edward 1 that a freeman seized of the entire fee

capable of inheriting, and death of the wife.

1. There can be no such thing as tenancy by the Curtesy, unless there has been a legal marriage. If marriage, in fact, is not sufficient. 2. Inst. 26.

2. The wife must have been actually seized, 2. Bl. 127. 2nd Co. 2. 116. 15. a. 29. 40.
and have issue of seizin in the wife is not sufficient. For in such case, the issue could not have inherited; of course, there could not have been issue born capable of inheriting.

In the case of Burt and Bradley, however, determined in Court it was determined, that the husband was entitled to the curtesy, though the wife was seized during the whole of the coverture. The principal, on which the Court determined this case was that the issue might, in point, have actually inherited. This decision seems to be right, for there are many cases in the L. Law, where though the issue might inherit, the husband could not, without actual seizin in the wife, have Curtesy.

It is impossible in fact to have a tenancy in remainder or reversion, for the wife is not actually seized. And of the reason of the case of Burt & Bradley is correct, inasmuch as the husband is to be considered as entitled, for a remainder is certainly inheritable. One reason why the husband cannot have Curtesy without seizin is that he has not done service to the wife in her lifetime, is neglected to perform seizin.

## Creation of a Tenancy by the Curtesy.

Tho' an Estate, devised in the Case of Husband and Wife, or other Relations when they joyn the issue may inherit the Husband cannot have Curtesy, without issue.

In incorporeal Hereditaments it is impossible for the wife to have actual seisin and yet in some cases the husband shall have curtesy, though it should be in Land in hereditament & not in actual seisin.

Co. Lit. 30
2. Vk. 27
Bac. Abr. 503

If an man marries an idiot the cannot have curtesy, because then could be no legal marriage.

B. Jenk. cent. 8 Ca. 16

2. Vk. 127

If the husband be Jure domicilii, and to Scotland or Ireland, it is the same that the issue should be born in the old country, and a posthumous child would not be sufficient. If the estate is limited to a Feme & her heirs male and the heir male of another, the husband cannot have curtesy. The time of birth is immaterial, it may come before or after marriage, whether it is born living or dead, or alive at that time.

Bac. Abr. 503

A husband may have curtesy, even in an equitable inheritance of the wife, though she has no legal estate — or if the wife has an equitable estate the husband may have curtesy in it, tho' wife should have been in an Equity of Redemption.

By the death of the issue the husband became entitled to the rents and profits, subject to a [illegible] 6 Co. 90 2 Ro. 128
[illegible] by the wife's death.

## Tenancy by Dower

3 Tenancy by Dower is an estate given to the wife, of one third part of all estates of inheritance, of which her husband was seized during coverture, provided that any [illegible] 2 Ro. 130. 2 Ro. 129.
[illegible] the marriage, and of which he shall have inherited [illegible] 2 Ro. 130.
[illegible] the wife's death; for this would become [illegible] 2 Ro. 130.
[illegible] at the time of the death, and not of the marriage relation, then subsisting.

But the wife is not barred of her dower by divorce or nullity of the marriage; for this does not dissolve the consummate matrimonii. 2 Ro. 130.

It was formerly held that if a woman married an idiot, she on his death was entitled to dower; but the rule is now altered. For the parties were incapable of entering into the marriage contract. 2 Ro. 130.

It was a rule of the ancient common law, that the widow could not claim dower in the tenement of her husband, this rule was altered by the 3d of Edward II. and now remained according to the nature of tenures, but by the 3d of Edward II. 2 Ro. 130 131.

# Dower.

Litt. Sec. 36. We have no such statute, in Virginia, and have never been made, under the constitution, and cannot be expected, we think, shall work a forfeiture of dower.

If a widow commits adultery, the court is authorized by the personal property act to bar her of a personal right, that is, a right to apply for a special statute authorizing it.

No female can be endowed unless she is above the age of nine years, ~~unless~~ at the death of her husband.

The estate in which the wife can have dower must be one in which they often might have had, perhaps, by hospitality, have the free enjoyment. The law does not require that the wife should have actually had quiet possession, but should have a claim by her first husband, and a second one shall be endowed for on the death of the first husband.

Land of some kind or estate & interest of which the wife of the party by his wife & a second wife on the death of her husband, cannot have dower; for her claim should never have existed.

The law does not require, as in case of the Tory that the husband should have had actual real estate; if he had a right of possession in it, it is sufficient. The connection between

this case said, that of Dower, it shall be
wife cannot have it in her power, to part with
actual seisin, during the marriage, and of course
can be supposed exempt of no neglect.

And a seisin of the husband for an estate
of freehold, however short, is sufficient
for, as regards this present point of seisin.
the whole land is paid from the husband
by the same act by which it is given
to him, and never may revide in him a
seisin, it is otherwise: as by a fine, &c.

Q. Can the husband commit waste
the wife's right of dower, by any act of
the husband's accruing concurrent from her right
is paramount to that of creditors, or purchasers
and she has an interest right from the
moment of marriage.

The rule in the courts in New York & Massachusetts
Bud in Penn. the wife can only be endowed
of what is afterwards the husband owns during
the husband's life, therefore, and consequently
wife by alienation, of her right of dower.

Sir Eng. the wife is not entitled to dower
in an equitable of redemption of a mortgage right
the reason of the ancient law was, that
said dower in this country good is, that the law is
partially adapted (not to be altered) when it is a matter

Ed. 1. 32 d.
Ed. 1. 31.

Ed. 1. 32.

Ed. 1. 32.
Dower.

wife was considered as entitled to dower, and

2. Mk. 187. Dunwid the respective proofs in such cases, that

1. Ld. Ra. 664. to the mortgagor and mortgagee's wife should

3. Ld. 229. not be entitled to dower. But the law in that

Salk. Ca. 188. respect is now changed and the mortgagor's

2. Atk. 525. wife can take nothing, that is the old rule, ~~[illegible]~~ provi-

1. Mk. Ch. 188. sion. The mortgagee's wife remains the same.

1. Ver. Ca. 326.

Ver. Ch. 327

Contra

2. Ch. 700

Ver. Ca. 17.

This question has been raised in Court, and it has been decided, that the wife is entitled, in order, to dower.

Ver. Chan. 319. 321. Dower in Eng. the mortgagor's widow is entitled to dower in the reversion, expectant on

Prec. Ch. 172 the mere decease for life, or for years. Though in

2. Vern. 418 the life estate in dower, it seems she has not a dower.

By the Common law, Dower is to be assigned to the widow, by the heir and to heir, or if he is

Ecc. 245 under age, by his guardian. The heir therefore

2. Ver. 135 must be the heir entitled to the whole freehold and the widow is considered not as a sharer but as an incumbrance to him.

If the heir or guardian does not assign dower, or assigns it improperly, the widow can apply and then the Sheriff assigns it.

We have a rule introduced by our Statute, for which see 2 Ed. 6. c. 26.

The wife forfeits her dower, by her elopement with an adulterer, unless the husband is afterwards reconciled to her; by a total divorce, by the wife's attainder; in mord. ancest. by the husband's treason; by her continuing from the kin, the bed and board and by her alienation, (by Stat. Glocester) either in fee or for the life of another.

Could the wife ever have her right of dower by keeping a fine, in suffering a recovery with her husband, barring dower? The Court seemed at first inclined to judge with him in a case P. After marriage in order to convey, & it is stopped from claiming that the was a feme covert? and this is the reason that the wife of conveyance or should prevail against her, & not however she is capable of transgressing: Appears chiefly by way of Estoppel. 2 Wms.

Or, lastly, the wife is not barred of dower by a total divorce, unless she was the faulty man of it. But here, as well as in C. P. a wife may be barred of her dower, by a voluntary, & written agreement. Tho' equity indeed, she may be barred after, by her acceptance of a jointure after marriage. This has been made a question, whether under our Statute, a jointure after real assets, may not bar the wife's dower — Dyer 108. Litt. & Bell. Rep. 109.

All estates for life within the meaning of the
statute are forfeitable and may be seized and levied on.
Co. L. 251. 2 Bl. R. 257. 274. A. & W. L. had also the words, a tenant in tail,
or in tail, or for the life of another.

## Estates less than Freehold.

Estates less than freehold, are of three kinds.
1 Estates for years; 2 at will, 3rd by sufferance.
At this day there is indeed hardly any such estate
known, as an estate at will.

An estate for years, is an estate for some
determinate period, already ascertained. Thus
an estate for 20 years, or for one year, or for three months
is an estate for years, a year being the smallest period
noticed in the law.

To distinguish such an estate is called the lease,
and he who takes it the lessee.

2 Co. 61. 2 Bl. 141. By a year, at common law, is meant an entire
calendar year — but by a month is meant no
lunar month, though the expression "a month" is
construed a calendar year.

Lord, in Cornish, the law takes no notice of
the intercalated days of a year. 2 L. 185. A leap year is counted
one day, as having been made at the time, when the
year commenced. A year is ten days, or fourteen days.

For the same principle of law is here always bound
before twelve o'clock. The month of the 3rd of December
is of fourteen days, the month of that year.

Every estate which must expire, by its own limitation, expire at a certain ascertained period, is an estate for years. Hence such estates are called terms. 2 Bl. 143. Co. Lit. 46.

It is said that every estate for years, must have a certain beginning, as well as a certain termination. This, indeed, flows from the nature of the case, an estate for years always will have a certain beginning.

And with respect to both the commencement and termination of the estate, it is a maxim "id certum est, quod certum potest reddi" So a lease for so many years as A. B. shall name is good. 3 Co. 25.

But an estate for so many years as A. B. shall live is void. This rule is founded in the uncertainty of life. For the duration of life is not ascertained. But why will not such an estate be good as well as an estate limited to A. for the life of A. B.? The reason cannot be an estate for the life of A. B. because if A. were there must be living of seisin. But it could be an estate for years, because it is an ascertained period of duration.

A. B. leases premises for so many years as A. B. shall so have, or said, because there is a certainty of duration. 2 Bl. 143.

Inasmuch as this estate cannot extend, there is no certainty of duration, it is not ascertained, it may be exceedingly long.

An estate for years, is a chattel interest and personal estate. Hence it is liable to be taken in execution.

# Estate for Years.

given a devise is construed, from the beginning of the term.

T. 31. 34 Consequence of this is, that the term may be
2 Ve. 1484 secured, & commence in futuro. But if the devise
estate is made by deed, it must from the
execution of the deed, commence at the time.

Tenant a dispe for years commencing in futurity or future,
Co. L. 46. is said to be void: For semel, ex hoc terminus, impli-
cit possession of the freehold.

The word from is used to signify, not only, the
commencement of the interest, but also a continuance therein
Co. L. 45. until the expiration of the term. Hence the term is said to commence
2. Ve. 44. from, to explain the beginning, before the expiration
of the time. If a lease is made to A for three years
and after the expiration of the term, remainder to
B. and A commences on possession the lease and
the end of one year, B's interest shall immediately take effect: But if the remainder to B
to begin after the expiration of the said three
years, his interest would not commence, until
the time has fully expired.

The interest to an estate for years may be made
2 Ve. 2 the event of a condition in expectant upon, or
determinable upon, an event which may happen.

But it is said in a recent case, that the event
2 Ve. 68 on the determination of the estate, must be certain,
for ascertaining the time of determination, or commencement
thereof.

## Estates at Will.

1. Tenants are entitled for crops in [illegible] or [illegible] or [illegible], before the expiration of the period limited, and in [illegible] determined, by the certain act of the landlord; the tenant is entitled to emblements, as if a lease for the [illegible] Willes.
is made of [illegible] lease; or, if a lease for this made an uncertain for 20 years, and only before the expiration of the time the tenant is entitled to emblements.

2. Upon the other hand the law is [illegible] the [illegible] [illegible] is otherwise.

## Estates at Will.

An Estate at Will, is one determinable at the pleasure of the lessor according to the general [illegible] Willes 55 [illegible] 3.
law; but it is in fact determinable at the will of either party. It is now settled that the lessee becomes a mere tenant for some period. If however the rent is received by the lessor between quarter days and saved, he lessee is entitled to the emblements.

An estate at will may be determined 1. by the express declaration of the lessor, repeatedly made upon the land or with notice to the lessee. 2. It may also be determined by some overt act of ownership exercised on the land, or entering thereon. Bacon 278.

3. An estate at will is also determined by the lessee making a feoffment or other act of the lessee to commence immediately. Though it may be commenced in future, it will not determine the estate at will till that time. Co. 1 Co. 55 2 Co. 55

# Estates at Will.

1. It may also be determined by express words, or by his interest or accomplishing events, or by the death, or act of any, of either of the parties. It is determined by the lessee's express dissent of his interest, because this is an act which he has no authority to do. The death of the parties determine it, because

5 Co. 116
Co. Litt. 55
2 Wil. 146

the consent of either the lessor or lessee to the continuance of the estate at will, can no longer be implied: and the same reason holds in the case of a tenancy.

If the lessor determines the estate, the lessee has the right to the emblements, provided it is determined between sowing and harvest.

1 Roll. 728
Litt. 44

If rent is payable quarterly, and no term, and lessor determines the estate, he must pay the rent to the end of the current quarter.

But Estates at will, have been construed to be tenancies from year to year, so long as the parties

2 Wil. 147
145 m
8 T.R. 3.
Esp. D. 340
3 Mod. 150

assent. It seems at first to make this construction in some cases as to have been an annual rent, reserved. But they now construe all tenancies at will, in the same manner. The reason of the rule

1 T.R. 159
160

is, that the latter cannot be determined

2 T.R. 483-7
4 T.R. 381
7 T.R. 54, 55
8 T.R. 3

till the end of the year and then, without reasonable notice, which reasonable notice is an annual to be half a year.

and though either of the parties should die, such notice must be given, as if both were living. 2 T.R. 159 3 East. 25 2 M. 148 n

The lessee also his exec.rs must give reasonable notice; and if it is the wish of the lessor, to determine it, he must give notice to the exec.r.

By the English Statute of Frauds & Perjuries, it is provided, that parol leases for any term exceeding three years, shall be construed to be tenancies at will. There, also, have been construed, the statute notwithstanding, as tenancies from year to year.

It is found no parol lease for any term, however short, is valid; an release, (not even at will) is of no more than a license, to excuse a trespass. 7 B.R. 254

It will be presumed then, that strictly speaking, a lease at will in Eng.d can hardly be said to exist. In the time of Blackstone the rule was not as mentioned as at present.

It follows from rules already recited, that notice to quit at any other time than the end of the year, is not effective. 1 T.R. 159

Still there is other general notice to quit given. The law is presumed to mean at the end of the year and such a notice will therefore be good. 6 T.R. 159 2 Wils. 75

If a tenant holds at the sovereign's will, notice to quit at the end of the year would be sufficient. 6 T.R. 219 1 B.&P. 311 2 Wils. 148

If the tenant holds at the sovereign's pleasure, the notice should be longer, or a period

# Estates at Sufferance.

2 Br. & H. 61. 2 Wms. & M. 147 note. If the notice given is void, and the tenant continues in possession, it cannot operate for any succeeding year, as notice to quit at the end of that year.

But want of notice, can never be set up by a stranger who claims the landlord's title; for then, he cannot be considered as a trespasser merely, or from year to year.

2 Br. & H. 147. 61. 2 Wms. & M. 147 note. But suppose it, this character, he is not entitled to notice. These tenancies are founded on the implied assent of the parties.

If there is a lease for years, and the tenant continues in possession after the year, with the landlord's consent, he is considered as a tenant, for another year.

7 T. R. 162 Bac. Ab. 185 2 Rd. For from the fact of his remaining in possession with consent, the law presumes a tacit agreement to hold another year on the same terms.

Estates at sufferance. If one comes into possession of land by lawful title, and continues afterwards in possession, without title, he is considered as tenant at sufferance.

2 Wms. & M. 150. 5 Co. L. 87. For instance, if a lease at will was made to A, and on the expiration of it, A continued in possession without some new agreement, he was considered as tenant at sufferance. But even this was considered as tenant from year to year, he is entitled to half a year's notice to quit.

5 Wils. 25 and 2 Wms. & M. 150. 2 Wms. & M. 150.

his estate may be determined, at any time, by the entry of the true owner. But the owner cannot maintain an action against the tenant unless he has made an actual entry. Co. Lit. 57.

Thus, the tenant holds over, and the owner brings quare ejecit fregit, the possession of the tenant will protect him, against every thing but a public entry; for the possession of the tenant having been originally lawful, the presumption of law is, that it continues so. 5 Mod. 284 2 Wil. 157

In the state of Ohio, actual entry is not necessary, that is, by law, in every case, whatever. He who has the right of possession, may maintain ejectment without the formality of an entry.

It seems to follow, that tenancy at sufferance does not exist, in Ohio. For the tenant may be considered, as a mere trespasser.

And now, in England, by stat. 4 & 11 Geo. 2. Principles of tenancy is nearly at an end. 2 Wilson.

A tenant at sufferance is not entitled to notice, quit, though an entry must be made before action brought. 1 Ld. Ray. 53. 162. 2 W. 150-1 note

# Estates in Possession, Reversion and Remainder.

Thus far I have considered estates with regard to their quantity of interest, I am now to consider them with regard to the time of enjoyment.

In this view Estates are divided into two sorts, Estates in possession, and Estates in expectancy. There sort are again divided into two sorts, the one, created by act of the parties, is called a remainder; the other, by act of law, is called a Reversion.

2 Bl. 163.

All the estates which are spoken of in the books are estates in possession, of course unless the contrary appears. By an estate in possession is meant a present interest, together with a right of present enjoyment. As contradistinguished from an estate in contingency, does not necessarily require an actual possession, but only a present right of possession and enjoyment.

2 Bl. 163.

Fearn. 1. Powell 24.

Suppose A. to grant, by deed to B a piece of land to hold to him and his heirs, now as this estate is not to be enjoyed to any future time, or till the happening of any contingency, A takes an estate in possession, viz a present interest with a present right of enjoyment which two particulars unite, serving to distinguish these estates from Estates in Expectancy.

# Estates in Remainder.

Co. Lit. 378. 2 Bl. 164 — An estate in Remainder, is one limited to take effect on the expiry of another estate in the same premises at a distance. As for example: a grant to A for life, remainder to B for life, after that the land shall revert to the donor.

2 Black. Com. 166. — Freehold estates, are considered as the principal of the same in reversion, all, together, constituting an entire fee; and so it is, if general remainders are limited. It follows that no remainder can be limited on a fee simple: for a fee simple exhausting, or including, all the interest, there is no room in a subject, leaft no remainder, to be limited on.

Bacon Abr. Remd. (A) — Proper words for limiting a remainder are "remainder" Bacon Abr. Remd. (A) 1. 170. — "remainder" Bacon Abr. Remd. (A) 1. 170. — and in most instances.

# General Rules.

To create a remainder, there must be some particular estate; for a remainder, for the purpose of supporting it the former remainder, and particular estate, are correlative.

2 Bl. Com. 164. Co. Lit. 49. Plow. 25. Cro. Jac. 240.

Is it said that in all cases a particular estate must precede a remainder? it is answered that a remainder, or alternate, implies a freehold estate. The estate must be created, not taken a particular estate, to commence in futuro, that the estate will not be a remainder. If an estate be limited in remainder to two persons, that their estate must not be joint.

A freehold estate cannot be created to commence in futuro. Hence a freehold remainder after a fee simple estate may be created. If an expectant estate is created it must vest immediately, either in possession or remainder. It must vest in interest, either in possession or remainder. It must vest in esse, which, in these cases, is no easy, operative instrument and cannot, from its nature, operate otherwise. The rule advances, whenever there is a subject & where there may be an estate of inheritance, [illegible] a bar to the freehold. The, upon reason, to recover the land, could be insuperable. This affords another reason, why a freehold can not be limited to commence in futuro.

Geo. 44

Forum. 274.
2 B.C.C. 165.

There is indeed an exception to this rule, in the case of a freehold rent, created de novo. For cannot, the reversion arise, from the nature of the case, there is no third person, to be surprised by it of a real estate; for rent, during the composition, no freehold is vested, in any one & recover it in the meantime, for until the rent surprised arrear, there is no subject, no rent in esse.

2 Vent. 204.
Pollex. 29.
Plowd. 154-6.
1 Ken. 146.
Salk. 577.

I have observed that the general rule is that an estate of freehold, must vest either in possession, or remainder.

A fourth estate is one of which there is a present right of present or future enjoyment, of an estate created for a fee simple remainder to Bonafide then is a present fee & right of future enjoyment &

# Estates in Remainder.

An estate vested in possession, is one in which there is a present fixed right of present enjoyment.

An estate vested in interest, is one in which there is a present, fixed, right of future enjoyment.

A contingent estate, on the other hand, i.e. an estate not yet vested, is one which is to accrue upon some future, uncertain event. As if an estate is limited to A for life, remainder to the unborn son of B. In this case there is no present fixed right of enjoyment, at all; the remainder man is not, and may never be, in esse.

Fearne 1. 2.

The object of the rule, that a freehold cannot commence in future is to prevent the freehold from being in abeyance, though there is another supposed reason for it. The ancient law would not permit an estate to be in abeyance, because it would fetter the inheritance, & there would be no tenant to the praecipe; nor 3rd an one to answer the feudal services.

2 Prest. 224. Fearne. 224. 2 Williams 155. 2 Bl. 362.

The meaning of this rule, as applied to estates in remainder, is that where a freehold remainder is to be created, a freehold must exist from the precedent at the time of forming the particular estate. Blackstone has, in one better case, improperly used the word "fee" instead of "a" freehold. For, in the case of contingent remainders, the freehold remainder never does exist at the time of creating the particular estate; yet such a remainder is recognised. This language, for this reason, is, indeed, in a great measure [illegible] in [illegible] to the praecipe & the feudal services

# Estates in Remainder

The first reason, that every freehold must be [illegible], once invested [illegible] [illegible] [illegible] [illegible] [illegible]. But the second reason is however sufficient. [illegible] [illegible] [illegible] in these reasons, except for an [illegible] [illegible] [illegible], in the case of remainders, with [illegible]. If an estate is limited to A for life with remainder to B in fee, or remainder to the heirs of B this remainder is good in the first case as a vested and in the second as a contingent remainder. for the freehold passed from ye grantor.

On the other hand, suppose a limitation is made to A for years, remainder to the unborn son of B, this remainder is void ab initio; for no freehold can pass in such case, from the grantor. But if this remainder had been limited after an estate for life, then a freehold having first passed from the grantor the remainder would be good.

A lease at will being so slender and precarious an estate, as not to be deemed a part of the inheritance, cannot support a remainder. It is true a chattel interest may be limited, to commence after an estate at will but not as a remainder. Plo. 75 Dy. 18 Pop. 81.

If the particular estate is void in its creation, the remainder intended to be limited upon it must necessarily fail: for ex. suppose an estate for life is given to the unborn son of A. remainder in fee to B. the grantee of the particular estate not being in esse the remainder estate is absolutely void. If the limitation to

# Estates in Remainder.

Co. L. 298 to B, had been of a chattel interest. It implied in-
2 Rol. 415. -clud. in and as a portion limitation of a chattel but
not as a remainder.

Plow. 414. Under a devise to one, not in esse, remainder in fee, to
2 Saund. 279. another, the latter may take the estate by way of execu-
tory devise, but not as a remainder.

And if the contingent estate though vested in its
creation, is defeated, before the remainder can vest in
possession the remainder must fail. This rule how-
ever does not, in general, apply to vested remainders.
For if an estate is limited to A for life, remainder to
2 Bl. 187 B in fee and A commits a forfeiture B's remain-
2 Wadd. 180-6. -der shall immediately be effected in possession. The
Co. L. 155 rule therefore, as said so well by Blackstone, is the ge-
Fearn. 299 274 244. 241. 261. -neral though in the example which he gives, of the
donor's entering for condition broken, it holds even
as to vested remainders. For as the remainder
depends upon the living of some in, made to the par-
-ticular tenant, if that estate is defeated by the
Q. Wadham- 190. 2 Black. 187 155. 156. grantor entering for condition broken, the remain-
-der must fail. And from the moment of the grantor's entering the living of person is considered as ex-
-tinguished: though this is not true in the case of a
forfeiture.

The second general rule with respect to remainders is that the remainder must commence at, or
out of the creation and the time of creating the estate or title.

This rule is unfortunately expressed; for if it were true, in the sense in which it is said, there could be no such thing as a contingent remainder. For a contingent remainder does not pass out of the grantor at the time.

Cro. J. 621
Plow. 25
2 Z. 49
Cow. G. 282
2 Wils. 177.

The absolute, or contingent right of the remainderman, must indeed, pass out of the grantor at the time of creating the particular estate. An estate is limited to A for life, remainder to B in fee. B's remainder lies in contingency, does not pass out of the grantor at that time. But suppose a limitation to A for life, remainder to B in fee when he shall return from sea. It is clear in this case that B has at that time a contingent right to enjoy that estate, at the time it is limited to commence, and it is equally clear that the remainder does not commence or pass at that time.

It was formerly thought, that in this case, if the contingency happened, the remainder passed out of the grantor, and did not rest in the grantor. But this cannot place the remainder in abeyance, contrary to the principle and law of the Common Law. For truth is the remainder remains in the grantor.

Suppose that before the happening of the contingency B proposes to sell his remainder subject to his heirs, subject to be defeated by the happening of the contingency.

Forth 212.
Fonn. 216.
4 T. R. 6
267

# Estates in Remainder.

A third rule is, that a remainder cannot be limited upon an estate already in one, as he has one already. The meaning of this rule is, that that the reversion in the grantor, after conveying a particular estate, cannot be transferred, but only that it cannot be conveyed, to take effect, as a remainder.

Cases 228 2 Mc. 65.

Second the rule is as stated with regard to a remainder, or to require that it should be limited in the same deed with the particular estate; otherwise there will be a suspension of time between the creating of the particular estate, and the intended remainder.

The third general rule is that the remainder must not in the grantor, during the continuance of the particular estate, or at the expiration of the particular estate, and the remainder, seize on part of the fee. And if a grant in tenancy, the subsequent limitation cannot be considered as a remainder. Where the subsequent limitation is of a freehold, if it cannot come into possession immediately the time of the determination of the particular estate, it cannot be a limitation of a freehold to commence in future. It is not known necessary that the remainder shall vest in actual possession, but only in interest, at the time of the determination of the particular estate. If an estate for years is given to A. remainder to B. B's remainder vests in interest, though not in possession, till the term expires.

# Estates in Remainder.

(Whenever the expression "a fee estate vesting" is used in the books, without the addition of other words, it is meant that it vests in interest.)

Suppose an estate is limited to A for life, remainder to the first born son of B. B has a son born, who takes a vested interest, at first, because he is ready in esse and on the contingency happening, the remainder immediately vests in interest. Again suppose an estate is limited to A & B remainder to the survivor. The remainder here never vests either in interest or possession, until the death of one of them, and then it vests both in interest and in possession.

Again suppose upon the contingency happening the particular estate determines the remainder never can vest, either in interest or possession. If an estate is limited to A for life, remainder in fee to B, to take effect one hour after the death of A, the remainder is void in its creation.

It is principally upon this third general rule that the doctrine of contingent remainders is founded.

Remainders are either Vested or Contingent.

A vested remainder is one by which a present interest passes to the remainderman, though to be enjoyed in future. i.e. a present fixed right of future enjoyment. The interest is vested, and the remainder is vested in possession, it ceases to be a remainder

Fearne 237
Bac Ab 213
Plow. 15
1 Co 68
128
3 Co 21
2 Black 78
80

Fearne 237 - 1.

2 W. 168
Bac Ab 748
Fearne 1.

# Contingent Remainders.

A contingent or executory remainder, is one by which, no present interest passes, but which is to rest in interest upon some uncertain event.

Cro. Jac. 20. If A were vested in interest in the certain event would be a vested remainder. If a limitation is made to A, remainder to B if he returns surviving the life of A from beyond sea, this is a contingent remainder. If B does return surviving, the remainder immediately becomes vested. But if A dies before B returns, the remainder is defeated.

Fitz. 228. 2 Bro. 19. Ream. 273. 2. 3. A. 2 Ch. 20.

By the strict rule of the old Common Law if a remainder was limited to the unborn son of B, and A died having a posthumous son, it vested in the man. This has since been remedied by Statute.

Fitz. 228. 4 Mod. 282. 2 Co. 51. 2 Wms. 20.

A remainder limited to one not in being, must be to one wholly common possibility, must be in one, and not before the determination of the particular estate. Else the remainder is void ab initio. So that if in fact, the person should actually come in esse, he could not take. The remainder must be a possibility at its creation. Suppose a remainder is limited to the heirs of B, this remainder is contingent, but not void or void. For the fact of B's being before the particular estate is not a remote possibility but potentia propinqua. The contingency arises from the rule that nemo est heres viventis.

Ream. 171. 2 Co. 51. Co. L. 254. 378.

# Contingent Remainders.

But if an estate is limited to A for life, remainder to the unborn son of B, the remainder is void in the beginning, because the possibility is too remote, since there are two contingencies, the one depending on the other. 1 Wms. 90. Cro. Jac. 286. 2 Co. 51. 1 Co. 99. Fearne 177. 2 Co. 51.

In the same principle, a remainder to S. S. the unborn son of A is void, for there are two possibilities, one that A will have a son, and the other that he will be called his S. S.

A remainder limited upon the happening of some thing unlawful, is void in its creation. The chancellor writes cannot this as founded on the doctrine of remote probabilities, the law will not indulge the thought that the event can happen. Hence a remainder to the unborn illegitimate son of A is void. Indeed the policy of the law will never contain a remainder which is dependent on the commission of an unlawful act. Cro. Eliz. 99. 2 Co. 51. Plowd. 22. Fearne 175. 176. 2 Wms. 90.

A contingent remainder of a freehold, can not be limited upon a particular estate less than freehold, for a freehold must pass out of the grantor, at the creation of the particular estate. But this freehold must not be the freehold remainder, nor can it be if the remainder is contingent, for a freehold must pass at once. If the rule, none otherwise than as it is a freehold. 2 Wms. 94. 2 Co. 52. Lloyd 151. 2 Bro. 399.

Suppose then, a devise is limited to A for life, remainder to the unborn son of B. The remainder is void, for it must be in the beginning made freehold.

# Contingent Remainders.

Contingent Remainders may be created either the remainder vested, i.e. before the contingency happens. If a remainder is limited to A for life, 1 Co. 66. 195 Q. Lev. 39. Fearne 241. 248. 252. 254. 262. 270. 272 remainder to B, when he shall come from beyond seas and A dies before B returns, the particular estate being determined and no interest immediately vesting in B, his remainder is void.

Contingent remainders may be also created, or barred by a fine levied, or recovery suffered, by the particular tenant for life. For by that act, the particular estate is 2 Bl. 171 n. Salk. 224. 1 Co. 66. Co. Cl. 650. destroyed, when the contingency comes happen. And the rule is the same, tho' the particular tenant should suffer a recovery to the use of himself — for the old estate is exchanged for a new one.

2 Wood 184. 187. A vested remainder, cannot be thus barred, by the act of the particular tenant. If he reverses a forfeiture, the remainder is accelerated; unless the estate was given him on an express condition, and he does not enter for condition-broken.

Yet tho' the determination of the tenant's estate before the contingency happens, destroys the remainder, yet, the mere determination of his estate, which 3 Co. 65. 7 Mod. 1. 2 Wood 190. 12 Mod. 174. 1 Ha. 316. he has the right of reversion, will not defeat the remainder. If the particular tenant is disseised, and dies so, if before his death the contingency happen the remainderman should take, for, in law, the particular tenant was seised as tenant to the freehold, & his death

From the rule last mentioned arose the necessity of interposing trustees to preserve contingent remainders. This expedient was devised by Sir O. Bridgman during the civil wars, in order to guard against forfeitures. They are limited in this manner, to A for life remainder to B, &c. to preserve contingent remainders, for the same life of A; remainder to the children of A or to whomsoever the contingent remainder is intended to go. So that if the tenant for life, incurs a forfeiture, the remainder would immediately vest in the trustees during the rest of his life.

Poulet 97. 76 ad 73. 5. Co. 51. 1 Burr. 143. 2 Atk. 246. 570. 577. Fearn. 84. 95. 120. 152.

Now with the regard to the distinction between vested and contingent remainders, I observe, the question depends on the nature of the limitation, and not, of course, upon the probability of it ever taking effect in possession. It is the uncertainty whether a remainder will vest in interest, and not whether it will ever take effect in possession, that makes a remainder contingent. Suppose an estate is limited to A for life, remainder to the heirs of his body, (who has already issue born) remainder to B for life, remainder to C in fee. Now though it is not very probable that the remainders to B, & C, will ever take effect, still both are vested remainders, being limited in no contingency.

Fearn. 149. 2 Saund. 94. 114. 192. Holt. 30. 31. 3 E.R. 488.

In the other hand, suppose a limitation to A for life.

Contingent Remainders — Cross remainders.

remainder to B in fee if B shall survive C, the remainder is contingent, in its character.

But though the distinction does depend on the time of the limitation, or on the certainty, or uncertainty, of the remainder vesting in interest, still a difference is wanting for the application of these principles.

The present capacity of the remainder man, to take in possession upon the particular estate now determined, is an easy and infallible criterion. If the remainder can take effect, in possession at the time of the particular estate determination, it is now vested; if it cannot, it is now contingent. This will be made very clear, by comparing it with some of the examples which have already been given of contingent and vested remainders.

Cow. 81. Robb. 88. Dyer. 300

If an estate is limited to two with remainder in one moiety, to me, and in another moiety, to the other, this is called a cross remainder; as when a remainder is given to the survivor of the two jointly named.

It is said that cross-remainders cannot arise between more than two. The rule is, that if there are three particular tenants and the limitation does not raise express cross remainders, the presumption is against them. Two of this description are liable to be reached. This rule was adopted to avoid embarrassment, from the complexity of the limitation

Co. L. 655
4 Mac. 337.
Comp. 780.
91.
2 Bar. 376.
4 B. 416.
1 Bar. 229.

But if there are such two particular estates the remainder is in favour of them.

It has been said that cross remainders cannot be limited in a deed. This is not true. The rule is that cross remainders cannot be limited, by implication from a deed. But in devise cross remainders may be created by implication. Thus in a devise, a limitation to A and B for life and to the heirs of their bodies, and in default of such issue, remainder over, A & B would take cross remainders, by implication.

Cf. Doe v. Rhodes, 8 East. 416.

It has been a matter of much doubt in Corn. whether a freehold may not in a deed, be created to commence in futuro. We have a Stat. enacting that no estate of freehold, shall be limited either by deed or will, except to a person in being or to the immediate issue of one in being. The language of the Statute would seem to imply that by deed, a freehold could be made to commence in future. The question arose in the Supreme Ct. some years since but no judicial determination was made; though the majority of the Court seemed to be against admitting such a limitation in a deed.

Cf. Doe v. Rhodes, not 1 Dev. 900.

There is a species of executory interest which is not strictly a remainder and which is called

An Executory Devise

# Executory Devise

2 Bl. 179. 1 Co. Abr. 186

An Executory devise has been defined to be a gift of land, to take effect in possession at a future time, or upon a future contingency. This definition includes contingent remainders, as well as executory devises.

It is said that every estate which does not take effect, is an executory devise. This definition does not define the expression sufficiently, because it does not distinguish remainders, with sufficient accuracy.

Fearne 298 303 3 Co. 487 Cro. Jac. 703 2 Saund 388 2 Ves. 611 2 Wood 222 Cowp. 234 3 B.P. 398 Batk. 304.

An executory devise is such a limitation of a future interest in land, as the law admits in the nature of a conveyance, and not in the form of a conveyance.

It will be perceived from this definition, that if such a limitation of a future interest is made by devise, it would be good as a contingent remainder, and not as an executory devise. And whenever a future limitation can take effect, as a contingent remainder, it is never to be construed as an executory devise. Suppose then a limitation is made to

Fearne 299 Batk. 310 Bac. 799 2 Wood 222

A for life, remainder to the unborn son of B.

This shall operate as a contingent remainder, and not as an executory devise.

Executory devises are construed according to the intention of the testator, and therefore the fixed rules of the common law, in regard to remainders, do not obtain.

Fearne 299 Bac. Ab. 258 2 Wood 221

Fearne 299 Bac. Ab. 258 2 Wood 221

The laws of executory devises originated in the reign of Elizabeth, and have since been ported into a system.

1 Cro. 77. 95. 95.

The Executory devise differs from a remainder not even as to the mode of its creation, much in its incidents, and qualities. As to the mode of its creation, it differs in three particulars.

1. By way of executory devise a freehold may be limited to commence in futuro, without any particular estate to support it. 2. By way of executory devise a fee simple may be limited, on some contingency, after a fee simple.

2 Bl. 378. 398. Salk. 229. Palm. 174. Cro. El. 878. 2 Lev. 305. 6. Raym. 2 Vent. 250.

3. By way of executory devise, a remainder may be limited of a chattel interest, after a fee estate in the same. Such limitations are void in deed.

These three sorts of limitation are in contradistinction, and ab initio.

If a contingent limitation is made by way of devise, to depend on a preceding freehold capable of supporting it as a remainder, and the particular estate determines before the contingency ever happens,* the contingent remainder shall never by way of executory devise. For by devise, an estate is limited to A for life, remainder to the unborn son of B. A dies in the testator's life, B's son is born, it is now impossible for this to take effect as a re-

* and before the testator's death.

manner, and the limitation will never be consid-
ered an executory devise. For, the devise is made
commencable till the testator's death, and inside time
of living and expectation, the contingent event is
construed to take effect as if the estate had been
limited at all, but only a future interest to B.

Fearne 401. 418 — Fulb. 8. 44 Doe v. Pitt 425. Pinkar. 12 Mar. 10 Ent. 124.

1. By executory devise a fee-tail may be limited to commence in future. Hence a limitation to
A and his heirs, to commence on the day of his mar-
riage, is good. So also a devise in fee, to the heirs of A,
when he shall have one, is good as an executory devise,
though there be no heir of a particular estate to support it.

Fearne 303. 1 Ld 153. Co. Ld 870. Co. J 597. Pelh 2 26 q. ante. 1 Co. 99. 4b. 158 Pelam. 132. Doe v. D 2 55 Wood 2 283.

There an executory devise is then in a contingency, it is revocable, to the devisee. The fee-tail remains in the devisor, liable to be revoked, by the happening of the contingency, and in the mean time, is reversible, to the heirs of the devisor.

1 Ld 58 505. 2 Wood 233 Doe v. P 481. n.

2. A fee or other estate may be limited, by devise after a fee, upon a contingency; as if an
limitation is made to A and his heirs forever
but if he dies before 21, to B and his heirs; or
to A and his heirs provided that if A pays
1000 £ to C, within 2 months, to B, and his heirs
that then C may be held and his assigns entitled
to the same time in lands. So the example above
is a second fee is conditionally limited, &c.

2 Ld 173. 398. 2 Ro. 289. Fearne. 303. Tab 249. 2 Wood 2 181. 188. 2 Ro. 220. 2 Ro. 225. 1 Co. 96. 360.

in esse, and it need to take effect after the expiration of a fee is presumed in law to last forever. 10 Mod. 420. Fearne 416. Bull. 210

3. By executory devise a limitation may be made of a remainder in a chattel interest, after an estate in fee in the same. For example. S. devises a term of years unto A. to A. for life remainder to B. 9 Wood 378 - 9. 8 Co. 95 - 2 Vent. 174.

This is good in a devise, though not by deed. For as a life estate is in the term, the limitation of such an estate, is a total disposition of the term at Com. law.

There was formerly, a distinction taken between the limitation of a devise, of the use of a chattel, interest, with a remainder over, and a bequest of the chattel itself, for life, with remainder over. But this distinction is now done away. Fearne 382 3/5 1 Co. 46. 8 Co. 95. 2 Br. 81. 1 Br. C. 366.

And a chattel interest thus bequeathed to successive persons is valid. 2 Vent. 174.

The distinctions I have, thus far, noticed between remainders and executory devises, relate to the mode of their creation. Fearne 386.

There is an essential difference between them, when created. A contingent remainder may be barred by a common recovery, suffered by the particular tenant. But an executory devise cannot be barred by any act. For a contingent remainder is dependant on the particular estate: and an executory devise, from its nature, is not dependant. Co. Lit. 378 Co. Lit. 358 Cro. Jac. 269 Co. Lit. 358 Cro. Jac. 227.

# Executory devise.

2 M. 78.
Co. J. 573
Fearne 326
314
10. Co. 52.
2. Saund 327.

An executory devise cannot be defeated or destroyed by any act of the ancestor, nor can it be defeated by a conveyance to a stranger, but it may be barred by a common recovery and not by a fine or deed.

But it is very material to know the rule laid down, that an expectant devise is created, as fair as it does a perpetuity, is an estate unalienable.

Fearne 314
2 M. 174.
10. Mod. 237.
Salk. 229.

But the law will only allow a perpetuity within certain rules limited. Hence, there is a rule established, limiting the period, within which a devise must arise, to the period 21 years and a gestation (allowing for the time of gestation) afterwards. An executory devise, therefore, is limited to the heirs or last surviving of B, the mere of occupier, or to the yet unborn of A or B or C. The law allows the 21 years in order to give the testator an opportunity of limiting his estate, to take effect only at such time, as the devise shall have sufficient and certain to vest.

Fearne 314
320 326.
7 Co. R. 34 b
100.
Willes 228.

The rule however is laid down differently by Blackstone with respect to the remoteness of a contingent interest. He says that when a remainder is limited after a life estate, all the remainders must be in esse, during the life of the first devisee, and that the contingency must happen during such time.

2 M. 174.
Cro. J. 457
Fearne 34

Contingency Rule.

According to this rule, a devise to a person not in being at the time of the testator's death, is void, unless it must vest within the period allowed by the rule against perpetuities. But such a limitation certainly is good, and therefore the rule is thus incorrect.

The rule appears now to be well settled as to executory devises of executory devises, that the period limited is the same, viz. the one first had or none.

2 Bland 370. 1 P. Wms. 224. 1 Ch. R. 87. Cases t. Talb. 253. 3 Atk. 282. 7 T. R. 100. 2 Bl. 284. 1 N. R. 275. 2 Bl. 1175 n.

It is a general rule then, that if an executory devise is limited, to take effect after a general failure of issue, as after one, two, or three lives, with no other restriction, the limitation is void, the reason of the contingency of the event being too remote. But if a limitation is made to A. and his heirs, and if he dies without issue, to B. and his heirs, then the event, or contingency is valid. But this extends to repugnant limitations.

Fearne 412 G. Fearne 411 Bl. 341 Calth. 208

As the limitation of estates, the words "the issue of such issue or heirs," denote a remote estate as heirs of A. any period of time, however remote. The contingency will not therefore, necessarily happen within the period prescribed. For according to this rule, the case, or event may arise in the lifetime of the person, or soon after his own death.

2 Bro. 477 2 Ch. 17

Such limitations are void in all the three cases of executory devises.

Fearne 384 394 7 T. R. 146 1 Ves. 279

## Executory Devise.

It arises from the very nature of an estate of inheritance, arising by implication for if an express fee simple or fee tail is not intended, an estate to it commence be created by implication. If inconsistent upon were intended, then the estate tail implied, would be to Prad. fee, merely, and not to subsequent limitations. An express fee simple would then be intended. For such no one would insist, as the construction, that an estate tail would be created by implication at repealed, since it could not be seen, without overspreading the manifested intention of the testator. The rule therefore, is by no means an unfavorable or unreasonable one.

But if a devise is made to A, and his heirs, and if he die without heirs of his body, remainder over, the limitation being to take effect, within a life in being is good. For a possibility, the law allows.

Acom. 552.
Co. L. 225.
1 Wms. 207
3 Prem. 28
1 R. P. 432
3 R. P. 258
3 S. R. 146
7 S. R. 422
Pow. D. 257

A power suppose a limitation is to A, and his heirs but if he dies leaving no issue of his body to B and his heirs, the subsequent limitation is good, on the same principle.

Suppose land is devised to A for life and if he dies without issue in the lifetime of B, and his heirs, the contingency with (period prescribed) remainder over is good.

## Executory Devise.

It is not to be understood however, that every limitation after an indefinite failure of issue is void, though the same objection seems, it always is. Thus suppose an estate is devised to A and his heirs and if he die without heirs of his body remainder over. A's estate is construed to be a fee tail by implication and therefore the subsequent remainder would be valid. Because, (since it may be barred by a recovery suffered by tenant in tail) it does not tend to create a perpetuity. But if it were a limitation after a fee simple it would be an executory devise, and therefore void.

2 Vin. 45 · [illegible] · Salk. 234 · 1 P.W. 23 · Hob. 170 · Cowp. [illegible]

The Court of Errors once decided that the words "if he die without heir," referred only to the time of his death. It is not, however, I trust to be considered that such a doctrine is now to be considered as law in Conn.

Any limitation of a future estate after the determination of executory devise or remainder dependent on a fee tail is void. As if an estate is made to A for life, remainder to his unborn son for life, remainder to [illegible] for life, remainder to the [illegible] is fee the [illegible] limitation is [illegible] [illegible] would be void.

Fearne 391-2 · [illegible] · [illegible] · 3 Burr. 165[illegible] · 2 Bl. [illegible] 592

It is a [illegible] [illegible] [illegible] [illegible] that [illegible] the [illegible] [illegible] of the [illegible] [illegible]

under a devise by giving the first an estate
tail.

5 B.R. 248, 254 from which rule, however, seems to be very very ex-
tensive rule, settled in the contrary.

When a contingent or other estate is devised
as a consideration annexed to a preceding estate,
and the preceding estate never takes effect, the
subsequent limitation becomes an absolute fee.

Cowen 105. 399. 415–418. 4 T.R. 470. 478. 1 Vesy. 420 2 B.R. 361. 1 Mk. 250 The first repugnancy takes place, or it should be
claimed to be for your remainder to his or
heirs, or he takes the whole estate and if
not, to S.C. In this case of the addition
fact to comply with the condition the re-
mainder to should take effect.

Now it is perfectly reasonable that the ultimate
limitation should then take effect, because it was
the testator's intention that it should never effect
on the former.

A devise is made to Ann Tuel, and for want
of issue, to B and if ever in the lifetime of the
testator the devise to him happened to be void
the devise shall take effect absolutely, as if there had been
no precedent limitation at all.

Cach. 223 226 Vent 345 Cro E. 422 2 Ven. 222

But this rule does not obtain if the pre-
ceding estate or limitation was void through
the nature of the constitution thus, if a devise
to an infant is devised to and if he dies without

heirs to B, remainder to C. The contingency on which B's limitation was to take effect being his survival of his estate must be taken in relation, an estate affirmative, and substituted must be applied by the same rule.

2 Sh. 231. 2 Atk. 362. 1 Ves. 134. Salm. 417.

Vested remainders are descendible, devisable, transmissible and assignable. They are in fact, fee, form an, to another, which they are given remainders, the being vested in interest - transmit vested possession.

Wood 187. 213.

In the case mentioned, the same rule is settled with regard to contingent interests; as soon that they are assignable, not in equity.

Hearn 288. 291. 289. Salkeld 117. Vern. 66. 2 Atk. 97.

I suppose then an estate is limited to B, by way of contingent remainder, and he dies before the event happens. The contingent remainder descends to B's heirs. These contingent interests which are remainders, are called "hopes, chances clothed with an interest."

2 Sh. 488. 1 Atk. 422. 615.

Held such a contingent interest when it descends, does not necessarily descend to the person who is heir at the time of the remainderman's death, but to the person who is his heir at the time of the happening of the contingency.

Hale Gilbert. 2. 29. 1 Saunders 28. Fearne rem. 2. 4. 225. 226.

There rules presuppose that the interest continues contingent at the time of the transfer. The remainder would be a vested one

Executory Devise

A contingent interest is not
assignable in equity or at law. The reason
of this rule is that it is a bare hope, for it may
be a thing which never happens. An expectant
interest is a right, which flows from an
existing interest, or rather is one of those
a present vested right to a thing which will be enjoyed
in futuro. It is said, that Bacon defines it
to be a kind of hope, though in fact it may be extremely
remote, to a person whose interest is made
to depend on a contingency of a valuable nature.
A contingent remainder or executory devise
can be transferred at law by deed, since
it is not a bare possibility.

But a feeble contingent remainder or executory devise may be barred or destroyed at law by the destroyer of the freehold, or common recovery, which differs from the remainder from other estates in
remainder in the remainder. Such a common recovery
barred mere remainder, and every
other limitation of the estate. It is a fine
and recovery. The fine and recovery
is intended in the second place barring the fee
that the remainder was contingent.

But an executory devise cannot be barred
at a common law. A remainder may be made
to depend on a future event by mere limitation of fee in the estate

1 Vern. 479
2 Stand. 213
Com. 440
448
1 Q. 401
2 Ves. 600

2 Stand. 187
212
Com. 482
Ved. 192
Rep. Tech. 288-9. 322
Com. 150

2 Stand. 212
238. 86-7
Cro. J. 593
Com. 510
513

in the subject. This is one of the characteristic differences between Executory devises and contingent remainders.

But though these contingent interests cannot be barred by a conveyance or transfer at law, yet they may be released to the owner of the land or hereditament in which they are vested, and a release operates either as a waiver, or a abandonment thereof.

Some abuse by attempting that events happening before the testator's death, may vary the limitation from a contingent to an executory devise.

Executory remainders may also be varied, and converted to Executory devises by an event happening after the testator's death, and the limitation was on a contingent with a double aspect.

Where there is a limitation which an event might have taken effect as a remainder, may be another that has happened be considered and construed, it is said to be on a contingency with a double aspect.

The reason of this rule is more fully for Doe v. Cole, or an executory devise is consequence of an event provided for by the very terms of the limitation. Effect thus a limitation is made to go for the remainder to B if he shall live at the testator's death — But to take effect if A dies and before the testator's death — Had this is another the contingency

Doe v. Cole 2 Term 213.
2 Term 152

Doe v. Cole 2 Term 213.

Doe v. Cole 2 Term 213.
2 Term 152.

## Executory Devises &c

in the manner, that there shall be a remainder [illegible] or to B. one year after the testator's death &c This last limitation cannot take effect as a remainder but must take effect as an Ex. Devise

If the first limitation is an executory devise, those which follow it, are so, of course.

It also seems in the case last supposed that

Fearne 247 when the first limitation vests in possession those

Fearne 396 which follow vest in interest, and become vested remainders. This however will not be true in case where the subsequent limitation depends on an event not happened, when the first vests in possession.

# Estates in Reversion.

Estates in Reversion, are the remainder of estates left in the grantor after the determination of some particular estate, which he has created out of his estate. Ex. A grant to A for life, remainder to B in fee — the fee remained first out of him, until the expiration of the prior estate, and remains in him, this is called a reversion.

2 Mod. 172
2 Mod. 175.
2 Mod. 175.
2 Bland 172.
3 Leon. 406.

The reversion is said to rest in the grantor by act of law without any reservation. Tenants by reservation are those who have a new estate not present, but reversion in him by reserve. So act of law can be reversion but rest in him.

Remainder can be created only by act of the parties. Reversion arises from the operation of law.

2 Bl. 175.

Possibility reversion, either as vested remainder is an estate in reversion, to take effect in possession, in future. It is therefore transferable, devisable, descendible &c.

Bl. 175.

But a contingent reversion, any interest which can never be known to exist, is not assignable, &c.

2 Bl. 175.

Reversion, when it is assignable, as a part of reversion, is equal. Thus in order to avoid a Devise, or a contingent reversion, a bargain & sale is made, & reversion is a remainder, as has been

[illegible] separately to the [illegible] and [illegible] of [illegible] [illegible] [illegible] and [illegible] [illegible] 2 Kan.

If a lease for life, remainder to A. for life, remainder to B. in tail, remainder to C. in fee, which remainder shall be valid? and if not, shall the [illegible] 2 Lev. 186-7. 2 Show. 170. 3 Ch. 2 Vk. 76. 99

[illegible] the ground, that a grant to "B. for life, remainder to the [illegible] remainder to B. and his heirs" [illegible] to B. is a remainder and must vest or else [illegible]

When land is received on a lease [illegible] 2 Vk. 174-6 the reversion is accompanied with [illegible] received from [illegible] the reversion will accrue [illegible] with it.

But rent is not incident to the reversion [illegible] 2 L. 151-2 2 M. [illegible] and the reversion. [illegible] of the rent with and [illegible] the reversion "Accessorium sequitur [illegible]"

[illegible] a rent, that [illegible] a lease, [illegible] the reversion [illegible]

entire: for till the lease enters, he cannot attorn; which at Common Law, was necessary to complete the title of an assignee of the reversion. But since the attornment has ceased, it would seem that the rule is not also to cease. The common law rule of attorn? is unknown in Equity, being founded on feudal principles, strictly peculiar.

If the reversioner makes a voluntary conveyance of a part of which he has only a reversionary interest, it seems that the reversion may be stamped by the word "Bond".

Independently of the Stamp Act, if a fee tail reversion, could not be created, as it by fine without attorn? A reversion lies in grant? How can it be tested? Perhaps, at the reversion becomes the [illegible] present possession, being in another he cannot make living absolute.

Still however, a vested reversion for years may be created without attorn.

But though at Common Law a reversion could be vested without a person, yet a reversion was necessary, it could not be created without attorn?, such being the [illegible] for attorn? at Common Law, in those cases when [illegible] was required.

[illegible]

# Estates in Reversion.

2 Cruise 174 — [illegible] is created in a Reversion until the [illegible] the ultimate reversion vested, in the grantee

It will be noted, that there may be a reversion of a

2 Cruise 175 / 3 [illegible] 74 — chattel real as well as of a freehold. Indeed there may be, what is equivalent to a reversion though not called by that name in a personal chattel — As if one lets a horse for a year — month &c.

There may be a reversion expectant on a life estate or there may be a remainder. This reversionary interest

2 Bl. 175 / Pow. Mo. 442 — however is so remote that it is not considered of [illegible] value. Hence if the reversioner dies, it [illegible] considered as assets.

It is a general rule of law that when a greater and a less estate meet in the same person, without any intervening estate, the less is immediately annihilated

2 Cru. 467 / Co. Lit. 338 / 2 Bl. 177 — in the greater or in the language of the law, is merged in the greater. The [illegible] of the [illegible] estate [illegible] considered [illegible] the [illegible] of the particular estate.

But this merger does not take place, when there is an intervening particular estate, for then, a third person would be injured. Nor does it ever

Plowd. 418 / 2 [illegible] 275 / 2 Bl. 177 — take place unless the particular estate and the reversion are held in the same right. [illegible] reversion is held in [illegible] own right and the particular estate in right of his wife, or of his testator.

This may be by a feoffment of land, or some other place where it would operate to give to a third person, for in feoffment land is conveyed by the feoffor's seisin, then it is an exception. Where an estate tail, which is reversion, not in the same person in whom the same rights, then shall be a remainder. For the principle being that there is a tacit or virtual surrender of the fee tail estate, and the tenant in tail having no power to surrender, does not some within the operation of the principle. There is another reason for artificial sir, that Donee, tenant in tail, in tail an estate and the operation made of barring the entail, than that of fine or common Recovery.

Co. Lit. 251

Co. Lit. 74

Co. Lit. 101.

# Estates in Severalty, Joint Tenancy, Co-Parcenary, and Common.

2 Bl. 179
2 Wms 112-13

II. With respect to an Estate in Severalty, there is very little to be said. It is an estate in which there is only one person during the continuance of his interest, and all estates are supposed to be of this kind, severally and by themselves, except

## JOINT TENANCY

2 Bl. 179
2 Rap. 188.
2 Wms 124.

II. An estate in joint tenancy is one which is granted to two or more, for example to A and B for life, for years, or at will. This species of tenancy is always created by purchase, or grant, and cannot be created in any other way. By this is meant that a joint tenancy cannot be created by descent, or by any operation of law.

2 Bl. 180.
193
Litt. § 278

When an estate is conveyed to two or more persons, without words denoting an intention that it shall not be a joint tenancy, it will, regardless, be construed as such. There is no need of the words "to hold as joint tenants" or "jointly" &c. But it is otherwise when the instrument contains words of a contrary import.

The properties of a joint tenancy, or rights incident thereto, are four fold — viz. of interest, title, time and possession. That is, joint tenants have one and the same interest, a same or one and the same conveyance, commencement or one and the same time, and hold the one and the same interest by same.

2 Bl. 180
2 Wms 128-9
2 Rap. 311

5. The meaning of the rule as to the unity of Interest is, that each of the joint tenants must have an equal quantity of interest. If an estate is conveyed to one for life and to another in fee or to one in possession and to another in expectancy, a joint tenancy will not be created.

2 B. & P. 271
6 T. R. 183-192.
2 Wood 197

If a grant is made to A and B, for their lives, they are tenants-joint of the freehold, and in the language of the rule, each has an estate for his own life and for the life of his companion. This latter part of the rule seems to be, not to convert the mere interest of A dies, B will indeed take the whole, and A's interest ceases. But the rule will only be applied to the survivor, and he indeed only has an estate in the whole for his own life.

2 B. & P. 271
1 Ves. 191, 197

The rule would be more correct if it were said that each has an estate for their joint lives, and the survivor has an entire estate for his own life afterwards.

If an estate is given to two, and their heirs, they are joint tenants in fee, and the entire either chance goes to the survivor of them.

2 B. & P. 270
2 Ves. 197

If a grant is made to A and B, for their lives, and to the heirs of A, they are joint tenants for their joint lives and the survivor has the fee in severalty.

2 B. & P. 271
6 T. R. 183
2 Wood 197

# Joint tenancy

It is proper to mention, that the Law of this Country does not allow of joint tenancy, but from some of the Law Commissioners it is thought, that the Law of this Country as to the man and woman who commit the fault in joint tenancy, ought to be the same having regard to their habits. The effect of such an act of the individual tenant would sever a joint tenancy.

2 Stud. 126-7 & p. 289

But if one of the tenants should be a man and a woman who may be the mother and a joint tenant: so that the entire interest, on the death of one, will go to the surviving party of the marriage.

10 L. 82. 2 Ch. 289

2. The second question is that of title. The Estate of joint tenants must be created by one act of the Conveyance, or by the same Conveyance or by one act of the same Testator.

Hob. 311 7 Co. 270 9 Stud. 220

Two have different titles of Conveyance and the other case.

3 The Estate of joint tenants, must commence at the same time: otherwise the joint tenants, may be entitled to take effect at different times, and both to take effect on the same Conveyance or Testament

So if a remainder is limited to A and B, and their heirs. — if A and B do not survive at the instant, though they will take by the conveyance, they cannot be joint tenants. In this case, it is not to be supposed, on any principle, that the heirs will not take — But they will take as tenants in common; and so in the other case.

2 Stand. 129
17 Co. 57
Co L. 188
2 Bl. 181.

It seems, however, that two or more persons may take a use as joint tenants, though the uses arise at different times. As if a feoffment is made to the use of A and the wife whom he shall afterwards marry. The use, upon principle and of the feoffment, shall have relation back and is said.

1 Co. 161
13 Co. 56.
2 Bl. 181

4. Tenants are seised per mie & per tout, by the half and by the whole. Each is seised of the undivided moiety of the whole, and not, (as tenants in common are,) of the whole of an undivided moiety. That is to say, each joint tenant has an undivided moiety in each particular part of the subject. The consequence of this unity of possession is, that one joint tenant cannot enfeoff the other. For both are already seised.

Co L. 188
5 Co. 10.
2 Stand. 170.
2 Bl. 182.

Co L. 196
Bac. 193-7.
1 Co. R. 78
3 Co. 206.

But when one joint tenant does, in fact, enfeoff the other, it operates as a release, and should be so said in pleading.

## Joint Tenants

When a conveyance is made to husband and wife and their heirs, they are not, as tenants in common, joint purchasers, but tenants in common. They are seized of one entire and undivided interest and possession, from every part of the land. They are seized by the whole and do not take by moiety or half.

A consequence of this is, that the husband cannot by his own act, even before marriage, impair the rights of the wife. But the whole may be alienated to the husband and wife, by a joint conveyance, as a fee, or their separate one the wife by way of jointure.

Cro. J. 291. Cro. 65. 3 Lev. 29. Co. L. 187. 227. b. Dyer. 223. 2 Mod. 182. 5 T. R. 654.

This joint rule has been used not only as to chattels real which are in the nature of chattels, but also in the case of freehold and copyhold property, in the case of a joint purchase, or joint conveyance.

3 Brad. 125.

A personal property is joint property and also vested in possession and not absolutely, it the husband may transmit to his representatives.

Ibid.

A wife is not entitled to recover in an action for money paid by the husband and another, for the other tenant has a right to the whole from the hands of the other joint. And if there is any joint possession, the husband cannot be entitled to recover from the joint holding with another.

2 Ch. 145. Co. L. 30 a. 3 Bac. 138. 2 Brad. 28.

Upon the union of matter and form in respect
of the principal intended act, and the
end of those intended, and done in the
separation of matter by our will be effected
as soon as death. Hence of a case is made
[illegible] by particular reservations to our
[illegible] and will appeared to the benefit of both.
If after we make a covenant to our [illegible] with
more the benefit of both.

Hence in the creation of the covenant
of [illegible] is in upon effect made to both
for the possession of one or another, is the
possession of both.

Other contracts are accidental covenants
by one will appear as the covenant of both.
Suppose two contracts are accidental and by some
[illegible], one contract — this prevents the establishment
[illegible] or bar, to the [illegible] of both.

By reason of this union the attorney is
[illegible] to their [illegible] and the [illegible]
be in a [illegible] [illegible].

It has been taken however in [illegible] the
of the [illegible] in one or alone. This [illegible]
[illegible] appear [illegible] to be [illegible] [illegible]
it is [illegible] [illegible] of the [illegible] [illegible] and [illegible]
a [illegible] to [illegible] [illegible] [illegible].
[illegible] [illegible] [illegible] [illegible] [illegible] [illegible] [illegible].

Joint tenancy.

But have one cause to complain, when
then he is entitled to a second prescription, Nor
Sup. Ct. can a person well have the bound can sufficiently
prove the claim of the other and call on determine
his title. And certainly if the occupation is a-
gainst his tenant, it will not bind
the other, or prevent him from bringing a se-
cond action.

By reason of this unity of possession one joint
3. Lev. 252 tenant cannot bring an action against another
2. Bl. 183 for the profits because they both have a right to
occupy each and every part.

But one of the tenants cannot regularly, do
any act which shall tend to defeat the estate of
1 Com. 274 the other. If A and B are joint tenants, A
2. Bl. 183 cannot lease, or alienate the whole so as to
oust the other of his right of possession.

Q. Ind. 407 And now, by Stat. Ill. one joint tenant
may now maintain an action of waste a-
gainst the other.

One of two joint tenants, by constituting the
6 L. 200. other his bailiff may have an action of account
2. Bl. 183. against him. But merely to receive one moiety
2. Bro. 130 more than his share of the profits, an action
at common law, would not lie. But now by
Stat 4. Ann. one may have an action of account
against the other, merely as a bailiff &c.

## Joint Tenancy.

Upon the union of interest, and possession, depends the grand incident, the survivorship, or right of survivor, to the whole remaining in the subject of the joint tenancy, after the death of his companion. If land be given to two jointly for life, the survivor of them shall have the whole interest, which never descends to the representatives of the deceased. The rule is the same, on a limitation in fee.

2 Bl. 183.
2 P.W. 281. 7 80.
2 Hard. 125.

The right of survivorship is founded on this reason "that as the original interest of both the joint tenants, with the same and extend to every part, and as this interest in the whole, is not divested by the death of one, it follows that he must hold the tenant of the whole, to which he has a higher title than any other person has to a part." And this right of survivorship, is paramount to the claims of creditors, except judgment creditors, who by subsequent execution before the death of the tenant, have obtained a general lien on his land.

2 Bac. 59.
2 P.W. 5. 286.
Co. L. 184.

And the rule of survivorship, extends also to a joint tenancy in chattels personal as to debts, terms, and conditions. But the rule of survivorship does not extend, to the case of the same mentioned to partition his property. Tenants in common are those.

2 P.W. 281.
Co. L. 182.
Statute of Ch. 2. 294.
2 Bl. 194.
Com. 217.

# Joint Tenancy.

Watson & Partners in trade, though a company incorporated
1 Ven. 115. 132. another act are not so, then, to sell goods.
1 Ven. 242. 252
Comp. 449. 814.

There is also another exception, to the law of survivorship, in the case of stock upon a farm,
Ven. 217. occupied in Ten. This exception is made for the encouragement of husbandry.
Co. L. 182. 2 Bl. 299.

For in the hand now any other corporation can be joint tenant, with a private person.
Co. L. 90. Blackstone assigns as a reason for this that
Finch. L. 83. the private person has no chance of survivorship.
2 Co. 12. 2 Bl. 184.

But this is not the true reason, for two corporations cannot be joint tenants with each other.
Co. L. 296 2 Wood. 126 and yet they have an equal chance of survivorship — for in an aggregate corporation neither
Co. L. 181. 2 Wood. 126 does not require that the right of survivorship should be equal. If A and B are joint tenants for the life of A. B has no chance of holding by survivorship. I apprehend the true reason is, that the right of holding joint tenants is foreign to object for which bodies are created: nor is it necessary to the existence of the corporate body, or to the exercise of its powers. It has no other rights which are not essential, provided that are not necessary for these purposes.

The rights of ownership have in Scotland been of flexible in all cases. As joint tenancy, upon which the joint-fee or liferent which has been mutual is more to be destroyed by a deed between the parties, there unity of title is over, being already joint, cannot be destroyed.

If then, two joint-tenants make partition, the unity of ownership is destroyed and the old infeftment is revived.

A common law, one joint tenant could not compell his co-proprietor to make partition, but now, by 31 & 32 Geo. VII. one joint tenant is allowed a compulsory process for this purpose.

We have a similar act in Scotland, by which the guardians of minor joint-tenants may make partition of the estate as their wards, though the proprietors were unknown, but the lots of the minor commencement made partition, which was found to be for their benefit, such partition was good.

(Lord Hailes mentioned, that in calculating in an action of partition the profits must be

A joint tenancy may also be destroyed by obtaining the unity of title — as if A and B were joint tenants and A conveys his share to C.

Contingency

But a devise by one tenant to a stranger, does not cover the tenancy, for the devise can never take effect, the tenant of the remainder being prior to him.

Contingency may also be constituted by a certain event, which is to happen, or if the inheritance is purchased by an order to one tenant for life, for, the moment the estate becomes the estate for life is the tenant to whom it accrues.

If an estate however is originally granted to two for life and to the heirs of them, there is a good limitation, to take effect in joint tenancy, if not a vested interest on the death of one of the tenants.

In Eliz. 70 2 Co. 60 Andrews Co. 1 Co. 182 2 Bl. 184

For there must be two distinct estates, and a succession in the same person to create a merger. Hence the estate for life is not merged by a remainder.

If one of two joint tenants, for life, makes a lease for life, to a stranger, it converts the joint tenancy into one of the tenants has now only a reversion.

If one of three joint tenants alienes the two others still their two parts in joint tenancy still, tho' as to the other part, there is a severance which makes a tenancy in common. If one of three releases his right to one of the two others, the joint tenancy as to their part remains but is severed as to the part of the one who holds one third as tenant in common.

Lit. 202 to 203. Co. L. 191.

2 Bl. 185.

# Coparceners.

Co. Lit. 241 a. If an estate in fee be devised to one and the heirs of his body, and he has issue two or more persons, as heirs of his body, they are all coparceners to the
2. Wms. 10.
Co. Lit. 163 a.
2. Wms. 188.
same estate, as if he had died intestate.

By the custom of Gavelkind there is no
2. Wms. 227.
Co. Lit. 245.
right of primogeniture, and therefore the sons all take as parceners.

In Borough English, even to daughters, it is not used in any of the states, but the right of primogeniture is reversed in all the states. Descent in some states, the youngest, most, still exists, tho' the rule of descent has been held a mere rule of the descent of
Co. Lit. 163.
2. Wms. 188.
17-18.
estate. The heirs then, in such states are parceners. They are all considered as one heir, and take the entire estate of inheritance together.

The ancestor of an estate is so considered, even in common law, that there is a joint
2. Wms. 188.
tenancy. But in coparceners only the three unities of title, interest, time, possession, are required.

Co. Lit. 164.
188-234.
2. Wms. 117.
Coparceners under no necessity to sever joint tenancy, which concerns the estate: and parceners, the entire gross is the subject of partition, to pass to parties the said of land.

An entry upon the estate by the guardian, gives an interest to the heir & gets the possession. Pl. 386. 2 Bl. 188. 2 Co. 220.

In consideration of these unities, one parcener can not maintain trespass for the entry of the other. Nor can a coparcener maintain waste against the other, tho' a joint tenant may by stat. Westm. 2. Cor. 174. 2 Mod. 185. 188.

For by the common law, one parcener was not compellable to sustain any so much waste, which a joint tenant could not at common law &c.

But parceners differ from joint tenants, in three respects. Parceners always claim by descent. Joint tenants, never. Litt. 254. 2 Mod. 114. 116.

Hence the rule is follows, that none but descendible estates can, ever be holden in coparcenary, tho' a joint tenancy may exist in any other estate. But in general whatever may be inherited may be holden in coparcenary.

In this species of tenancy, no unity of time is necessary. Since if one of two parceners dies, leaving an heir, the heir and the other parcener, are coparceners. Co. Lit. 174 2 Mod. 114.

Though coparceners have an unity of title and interest, yet they have not, like joint tenants, an unity of interest. Each is seized of the whole of the undivided moiety, hence there is no jus accrescendi. Co. Lit. 163

# Coparcenary.

and the estate on the death of one Coparcener descends to his heir.

The descend is per capita, if the claimants are collateral in equal degree, to the common ancestor, since are entitled in their own rights. As if one dies, leaving two daughters, his heirs. A descend per capita differs from a descend per stirpes in that the claimants in the former case by law take equal parts.

Co. L. 164. 2 Mod. 115.

In the other hand, if the claimants are not in equal degree, or are entitled by rights of representation they take per stirpes. Heirs take per stirpes when they take in right of another, from a common ancestor. As if tenant in fee dies, having had two daughters, one of whom had having children. The daughter takes one half and the children, the other, the part which their mother would have taken.

Co. L. 164. 2 Mod. 114-115.

Where of the parties claiming jure representationis, are all in equal degree they take per stirpes.

Co. L.

The descends from Coparceners, makes an Entire tenant preferred, as in other cases.

Land in tail or fee held one half in coparcenary, continues in a course of descent other

having been no partition. It is still held in coparcenary. But when partition has been made, the coparcenary ceases.

So also if one of two original coparceners alienes her share, the coparcenary is severed for the purchaser not claiming by ancestor, the tenants are different. 2 Mod 7. 2. 2 Bl 188 189–191.

If two coparceners are, having husbands entitled to courtesy, they are not coparceners for the husbands do not claim by ancestor. 6 L 187. 2 Mod 19.

I know not why it should ever have been doubted, whether a wife should have dower in law or has been by her husband in coparcenary. The husband certainly has a right to courtesy. There being no right of survivorship in coparcenary, there can be no objection to dower or courtesy. 2 Bl. 188. 2 Mod 7. 9.

Partition may be voluntarily made in two ways, at Com Law. 1. By agreement as to the part to which each shall be entitled. 2. By an agreement that another shall divide for them. 3. By permitting the eldest to divide, and giving the choice to the other. 4. By casting lots. 2 Bl 189. 2 Bl 248. 14 3 Co. 2.

But parceners may at Com law compel each other to make partition. This may be effected by a writ of partition or a bill in Eq. 2 L 241. 2 Mod 120. 2 Bl 189.

# Co-parceners.

On the writ of partition there are two judgments, 1st that partition be made, and upon this there issues a writ to the Sheriff commanding him to make partition by a jury. And then, the 2d judgment is, that this partition be ratified and confirmed from which time the parceners become tenants in severalty.

It was formerly usual in these cases to apply to Chancery, but the practice has now ceased except in those cases where the estate is incumbered or the title perplexed.

2 Wood 120.

There are the rules regarding partition when the subject is divisible. But when the estate is of such a nature that it cannot be divided without ruining it the practice is for one of the parceners (the eldest, if she chooses) to take the whole, making the other a reasonable compensation, out of the rest of the estate, or for them all to occupy in turn.

We have a statute provision on this subject. The latter is the usual way, when a mill descends, in this, and the neighboring states.

# Tenancy in Common

Tenants in common are said by Blackstone to be those who hold by several and distinct titles and by unity of possession. 2 Bl. 191

This definition however is not perfect. For it is true that all who thus hold are tenants in common, yet all tenants in common do not hold in this way. For tenants in common may have their estate by one and the same title, commencing at one and the same time, with the same quantity of interest, and upon terms are said to constitute them tenants in common, and not joint tenants. Thus, Co. Lit. 188 a, 1.
surviving are stated practice to stand. Bacon Abr. Joint Tenants 1 Wms. 1332
Joint Tenants if no other words are used, 2 Bl. 181.
are joint tenants. But if the words of the grant are that the estate hath by tenants in common and not as joint tenants, such will be their tenure.

And if there is no other unity than that of possession the tenants are in reality tenants in common. For a tenancy in common Co. Lit. 188 a. 1 Bac. Ab. 194.
no other unity than that of possession is no 2 Mod. 70.
tenancy. Hence had Coke defined tenants in common to be those who hold by several titles and by one title in several rights. And then we should have a common not unity.

# Tenancy in Common

One tenant in common may hold in fee and another for life, there being necessarily no unity of interest. So one may hold by purchase, and another by descent
2. Ma. 192. but being no necessary unity of title. So one may become tenant to one time and the other at another.

A tenancy in common may be created by such a destruction of a joint tenancy or
1. Ja. 293. 295. tenancy in coparcenary, as does not sever
Co. L. 189. 191. the possession, or by special limitation or devise. If one joint tenant alienes his
2. Ba. 194. part to a stranger, and the other tenant
2. Brooke 194. are tenants in common.
Co. L. 309.
3. Ba. 194. So if one of two parceners conveys her right to a stranger, the latter and the other are tenants in common, for the same reason.

When an estate is granted to two men
Co. L. 283. or two women, and the heirs of their bodies
2. Bl. 192. the original donees are joint tenants. But their issue are tenants in common, which their estate is undivided. They claim under different titles. And whenever a joint tenancy or estate in coparcenary is destroyed,
3. Bac. 194. 2. Bl. 193. without partition, the estate is taken in common.

A tenancy in common may be created by deed

to devise. But care must be taken not to use words which will create a joint tenancy.

Generally, and I believe universally, if an estate is granted by deed or devise, which is not a joint tenancy it is a tenancy in common, if given to two. 2 Bl. 193.

The rules of construction favour a joint tenancy, rather than a tenancy in common. And the reason is that in the latter case the general creditors were deceived but not in the former.

The most usual and the safest form of creating a tenancy in common is to limit it the estate expressly to A and B to hold in common and not as joint tenants. But other modes of expression will answer: as if a limitation is made to A and B to hold one half to A and the other half to B they are tenants in common; for thus take the distinct moieties which cannot be true of joint tenants. 3 Mac. 190. 2 Bl. 192-4. 1 Bl. 194. Co. L. 90. 3 Mac. 94.

And if one man and a half has land to another and the moiety and half in common; for then there is a tenancy partly joint and partly by attornment. 1 Bl. 194. Co. 90

# Tenancy in Common

But a devise or devise of land to two persons to hold in fee and severally & also a joint tenancy and not a tenancy in Common. The words "joint" in both a joint tenancy and the word "severally" only imply a power of severing the estate.

Pl. 82.
2 Bl. 193.

An estate devised to two, to be equally divided between them, is a tenancy in common, for the intention being manifest is all that is necessary.

3. Co. 39.
1 Ventr. 32.
2 Strk. 329.
2. Vol. 90.
6 Ves.

And it has been determined that a devise to A and B, equally creates a tenancy in common.

2 Ves. 257.
1 Eq. Ca. Abr. 292.
Co. 2. 675.

It was formerly ruled, however, that these words in a deed, would create a joint tenancy, and so the rule is laid down in Blackstone.

1. Bl. 17.
2. Bl. 193.
Com. R. 88.
3. Mac. 195
1 Ha. 622.

In a modern case, however, these words in a deed have been held to create a tenancy in Common.

2 Stand. 135.
1 Wils. 341.
Cowp. 660.

A tenancy in Common, may subsist in estates of freehold, chattels real and chattels personal.

1 D. P. 320
2. Wood 135.

As there is no survivorship, between tenants in Common, dower and curtesy may both be had in an inheritable estate.

1 D. 4. 5.

As tenant for years have distinct rights, one may exercise convey his right & his estate. This joint & tenants do not possess. 2. Mod. 175-176

Tenants in common cannot at Com. law, compell his co-tenant to make partition, but this is now allowed by Stat. 31 R 2. Henry. 8th. But coparceners might at Com law compell a partition, for the estate is cast on them by descent, and joint tenants and tenants in Common claim by purchase or alienation. 2.31.194.

Tenants in Common have no right of survivorship, for they take distinct parts. 2 Co. 60. 387. Lit. § 311. 5. Rep. 216-7. 6 L. 197.

Tenants in Common cannot join in actions relating to the realty, for their titles are distinct, and so generally are their interests. Co. Litt. 190. Co. Litt. 142. 2 Ma. 422.

But if an incumbrance is taken in Common and to be sued for, all the tenants in common should join. Co. L. 197. 2. Mk. 194.

So also in ejectment and all other actions all the joint tenants or tenants in common must join, although their interests are severally, and the damages are indivisible. 2. Q. Mk. 387. Co. L. 315. Rep. 20.

And I would refer to Co. Litt. & the notes & cases collected on the subject.

# Tenancy in Common.

as to personal actions to be brought by tenants in Common, they are quasi joint-tenants. The damages are indivisible, and the action survives to the survivor. If, and B are tenants in common, and B dies, after a trespass has been committed; the whole right to the action and damages survives to A.

Cro. Eliz. 194. Co. L. 198.

If tenants in common make a lease rendering rent, the reservation will follow the estate which is several, and they may sue thereon severally for rent arrear. But in an action of debt for the rent they must join, for this is personal.

Co. L. 197. 2 Ld. Ray. 987.

If they are ousted, they cannot join in an action to recover the land, for their titles are distinct. Indeed, they cannot make a joint lease, to found an ejectment.

1 Shep. 342. 2 Ven. 214. Carth. 224. 2 Salk. 232. Cro. J. 166. 2 Ld. Ray. 387.

But this rule does not hold as to joint tenants and Coparceners, who hold by the same title.

1 Ra. 726. 1 Will. 1. Ib. 1181. Esp. Dig. 449.

It has however, been decided in Conn.t that tenants in common, may, and their chattels, bring a joint, or several action to recover the rent. This is, however a departure from the common law. There is law, in joint tenancy in power, and

could, therefore, be no joint action. Suppose the title of one is good and the other bad, what shall be done in this case? If they join, both suppressed, must recover, or neither.

If common law, one tenant in common cannot sue his co-tenant in account, or otherwise, for receiving more than his share of the profits. But this action is, even in such cases, by Stat. 4 Anne. And the action of waste is likewise given by Stat. Westm. 2d.

Co. Lit. 172. 199. 200. 2 Bl. 194. 2 Bl. 183. 194.

If one tenant in common ejectments, or evicts his companion, the latter may maintain ejectment. But to entitle the tenant in common to maintain this action, there must have been an actual ouster; for until then, the possession of one, is the possession of both. The same reason allows other actions to recover what the title is adjudged, passed off, and the rule is established that sole possession, and receipt of the whole profit by one, is not considered an sufficient proof of ouster. It is not necessary, however to have a possible tenant at the 30 Hen. 8 tenant. Sole and adverse possession is a sufficient ouster, to entitle the party entitled to an action of ejectment. If then one takes the sole possession, denying the other title, this is sufficient evidence of an ouster.

6 Co. 198. 3 Wils. 118. 1 Burr. 568. 2 Bl. 194.

6 Co. 198. 2 Ba. 404. 3 Ves. 5 Ch. 1 Ves. 531, 960. 1180. 7 Mod. 239.

Co. Lit. 217. 3 Mod. 1695 2 Ba. 312 12 Mod. 650.

So also, still and quiet possession for a great length of time, without demand from the other, of an account for the profits, is sufficient evidence to the jury for them to infer an actual ouster.

3 Mod. 895 Salk. 285. 1 Ld. Raym. 96. Cowp. 45.

The defendt's confession of lease, entry, and ouster is sufficient to enable a jury to infer an ouster and so prevent a nonsuit for want of proof of actual ouster. But an action, is not like the Ejectment a possessory one.

The stat. of limitations does not run against a tenant in common, when out of possession, unless there has been an actual ouster by the other.

Cow. 217.

The judicial remedies of tenants in common, extend only to tenancies in things real, or appurtenant to the realty. If a chattel personal as a horse for ex. is held in common, and one takes the sole possession, the only remedy for the other is, to redeise him, when it lies in his power and use him, as much. No action, at law, can be maintained.

Lil. p. 323. Co. L. 200. 3 Bac. 719.

Tenancies in common may be destroyd by partition, or 2d. By uniting all the title and interests in one, by purchase, or descent. The estate is then held in severalty.

2. R. 174.

# Title by Execution.

By Statute in Conn.t and in many other States the levy of an execution has become a common mode of acquiring a title to land. And in this, there is, in some respects, a material difference between our Statute and the Common law.

I shall first consider Execution at common law. By the common law the only executions in personal actions, except against an heir, were those of fieri facias, levari facias, and capias ad satisfaciendum.

3 Co. 11. 12.
3 Bl. 414-18.
Com. Dig.
2 Tr. 71 & n.
6. 1. 2. 8. 9.

Fieri facias. Upon this execution, only the goods and chattels of the deft can be taken. But chattels real are alike subject with chattels personal. And the personal property thus taken is to be sold by the Sheriff in satisfaction of the judgmt.

6 Co. 290.
8 Co. 171.
Com. Dig. ex.
6. 4.
1 Tr. 417.
2 Co. 171.
Com. Ex. B.

The execution, by writ of Levari facias extends the goods, and the profits of the land of the deft. The Sheriff on this execn. means take the possession establishment of the land.

Rev. 441.
Comb. 470.
2. Wms. 54.
6. 4.
Com. Ex. B.
6. 9.
Ibid. 10.

Money also may be levied on and due to the deft.

On either of these executions, all the ~~[illegible]~~ personal property is sold not a-

# Title by Execution

3 Co. 2. Cont. 356. 2. Roll. Ab. — any wearing apparel may be taken. But

neither can the lands be taken for they

3. Co. 13. are to be only of personal property.

Fixtures, such as doors, locks & being

Rol. Ab. 891. Roll. 358. Com. Ex. B. 4. regarded as part of the freehold cannot be taken.

Formerly, at Com. law, there was no execution

on which, the creditors bond could be taken, except after his own death, when they accused his

3. Bl. 418. heir.

The execution by writ of Capias ad Satisfaciendum, issues only against the body of the debtor. It was allowed

Rol. 12. Rol. 289. Com. Ex. A. only by the com. law, in those cases, where

St. 3. Ed. 2. the injury for which judgment was recovered against the ought was committed by force, unless the judgment was in favor of the King.

For breach of contract the body could not at common law be taken.

At Com. law, then, if a subject recovered judgment in an action damnum or in case, or

2. Bac. Ab. 228. contract &c. he only had his choice of the two

3. Co. 12. former writs. But this was the rule in all

Com. Dig. 404. cases when the action did not lie in force.

Against the heir only, could he have an execution on the bond?

Bond by Stat. Marlb. 52 Hen. 3. Westm. 2. 13 Ed. 1.

and 27th Eliz. c. 3. the execution was extended to actions and commission of lunacy. 3 Co. 12. 5 Co. 86. 2 Rolle. 83. Co. Lit. 289. b.

But though in Equity the heir may by writing of his forebearance have an execution against the land of the ancestor, yet from feudal principles, this was never allowed to subjects. 3 Bac. 418. Plow. 481. note. Co. Lit. 192. 2 Mac. Ex. 30.

But on a judgment against the heir, upon the obligation of his ancestor, the judgment and Commonwealth, have an execution upon the land holden by descent from that ancestor. 3 Co. 12. Plow. 440. 441. Com. Dig. Ex. C. 2. Plow. 2 B. 6.

Otherwise the liability of the heir would have been merely civil, his person was never liable in such case — the fund only, which he received from his ancestor, bind the creditor. And this fund is the land of the ancestor, since his personal effects pass not to the heir — but to the executor, &c.

In such case, however, the land was moreover extended to be holden until out of the rents and profits the execution be satisfied; the fee could not be taken, nor even it now by the Com. law. Plow. 439.

But by Stat. Westm. 2. the 13th chap. in cases of debt, as 2 Co. 66. 2 Co. 416. 2 Mac. 349. actions, have an execution called an Elegit, which gives a moiety of the goods, chattels and wages of the freehold of the debtor.

# Sale by Execution.

Under this execution, the goods and chattels are not sold, but appraised, and delivered to the creditor, and the land is extended, until all and of the rents and profits the judgment shall be satisfied, unless the debtor interest expires before that time.

Com. Dig. 8 14.
2. Bl. 161.
2. Ra. 349-0

By Stat. 13. Eo. 1 and 27. Eow. 3d, two new species of Execution were introduced, called Statute, Merchant, and Staple.

The case of a forfeiture of recognizance, or debt acknowledged on these; the body, lands and goods may all be taken at once in execution, to compell the payment of the debt. But the lands are extended only.

2. Bl. 160
289
3. Bl. 420.
Ch. N. B. 131.

In Conn. we have but one species of execution in personal action, and that goes against the goods, lands and body of the deft. By our law, when goods are seized on an execution, payment be immediately forbore, and after the expiration of 20 days, they are to be sold at public vendue.

Eo. C.
280-1
622.

But before goods can be taken, demand of money must be made, at the deft's place of abode, if that is within the officers precinct, but he need not pass out of them to sei it.

The sale must be at the sure of bidder by day, the acceptance and parties being the bid,

ence if it be before, or after that time, the Cor. v. Landon. 1 Ld. Ray. 62 Ld. Ray.
sale is illegal, and the Sheriff a trespasser.

If sufficient personal property is taken, Ld. 282. 4 Co. 6.
or, neither the body nor the land can be taken. 2 Sw. 283.

It was formerly doubted, how, whether man.
ey could be seized on an execution. Doughty 2 Show.
I should much sooner think of seizing 166. Co. 11.
a debt as any other property. Wms. Ex. Doug. 219.
now settled that money may be taken. 1 Rod. 216. Seizure in England vide East R.

But if sufficient personal property is not Ld. 282.
tendered, the Ptff may take the land or debts 2 Sw. 132. 284.
of the deft. If he take the land, it is to be
appraised to him.

But if the Sheriff without a delivery
from the Ptff takes land when he might
have taken personal property, or the body, he 1 Sw. 283.
is liable, to the amount of the debt, to the
creditor.

By our Stat. the necessary apparel of
the debtor and his family, necessary tools, wood. 2 Cords. hay. 2 tons. Beef or pork. 2 cwt Fish. 2 cwt Potatoes 5 bush. Turnips. Do Wool or hay 20 lbs & Physicians horse. Ld. 281. 1 Sw. 284. also by Ld. 292.
working implements of husbandry, furniture
one cow, sheep not exceeding ten, fifteen
swine, are exempted from execution.

But if there are more of these articles,
than are necessary, the may be taken. Ld.
If they are tendered, the officer may
take them.

# Sale by Execution.

If after the capias is taken, and before commitment, personal property which is sufficient to satisfy, the sheriff must return the capias.

9. Wend. 284

By the Eng. Com. law, if the sheriff after taking the body, permits the debtor to go at large

Wend. 269.
9 B. R. 176.
3. Bac. 240.

on his security to return within the life of the creditor, he is guilty of a voluntary escape and his security is void. But our C.s have holden

1. Wend. 193.

the security to be good.

By the Com. law, if the sheriff is satisfied as

4 T. R. 633.
638.

to the ownership of property he may summon a

2. D. M. 238.

jury to ascertain it, and if he does not do this he seizes at his own peril.

In Conn. the sheriff has no such power but must use for himself. If then, there is any doubt as to the debtor's title to the property, he need

9. Sw. 283.

not take it without security from the creditor, to save him harmless.

If the creditor secures property to the officer

2. Sw. 287.

which is not the debtor's, and the officer is subjected

Com. D.

for taking it, the creditor must indemnify him.

If the officer does not take property sufficient

Bac. Ab. Ex. B.
1. Wil. 91.

to satisfy the execution, by the first seizure,

2. Sw. 282.

he may make a second.

But if the sheriff levies on property which is insufficient, and can then find no more, nor

the body of the debtor, he is liable to the party, if he might originally have taken the body. For if he seized free property enough, he is always bound to take the body, unless otherwise directed by the creditor. But this rule presupposes that the officer could originally have found property enough on the body. 2 Tho. Ent. 282.

It has been a practice not unusual in Comm. when property has been attached by one creditor, for another creditor, by another officer, to levy on it in the hands of the first officer. This has been holden to be illegal in Massachusetts, for the officer attaching goods, must take them, to make the attachment effectual. But even the second execution committed to the former officer, the levy might well be made. And so might one deputy levy on goods in the hands of another deputy of the same Sheriff; for they both represent the Sheriff. 5 Mass. R. 271. Holden to be good 2. Comm. R. Coles v. Worster

Under our Statute, the fee simple of lands may be taken in execution. The Stat. subjects the whole of the lands taken in fee simple, and by the terms of it, no other. But, it has by construction been extended to all estates in lands, and tenements, though fee simple only is mentioned. And the duties of sh. or off. in all cases the same. Stat. 282. Sec. 1. c. 6. Sec. 1. 82. 1 Day. 90. 2. Rich. 25. 10 W. 334-5

# Title by Execution.

Ld. Ray. 98. 8. Bard. 463. 2. Dr. & L. 461.

Our Stat. Law has extended to Equities of redemption. But in Eq: no equitable interest can be taken on an execution.

Stat. 280. 1 Root. 241. 1 Sw. 332. 2. Pr. 282.

The mode of acquiring a title to land is regulated in Conn. by Statute. The officer must first demand the money and the debtor's place of abode, if it is within his precinct.

Stat. 282. 1 Sw. 332. 2. Root. 19.

If, on this demand, the money is not paid nor sufficient personal property tendered, the execution may be levied on the land.

The phraseology of our Statute, leaves it doubtful whether the sheriff may levy on the land, if he can find sufficient personal property, though it is not tendered. But I believe I have given the true construction.

1 Root. 241.

If real estate is taken without demand, or after personal property tendered, the levy is void, and no title acquired.

Stat. 284.

And this demand must appear on the execution, or the levy is not good.

But there is an exception to this rule, where the execution was returned before the 1st of Sept. 1800, before which time it was not required that the demand should be stated in the return.

1 Root. 241. 1 Sw. 346.

There is a case in Root where it was holden that if the debtor shows out of the appraisement and no return of a demand was made, the ex-

execution was proved. But that is not now, law, if it ever was.

When the land is taken it must be appraised by three indifferent freeholders. For the manner of appointment see Stat. 283.540. 1 Root 196. 2 Root 124. 1 Sw. 335. 1 Day 109.

It has been holden that persons nearly related by consanguinity, or affinity, as uncles or nephews, are not indifferent. 1 Day. 109.

If a feme sole having obtained execution marries, she may still, it is said, appoint one of the appraisers. Quere by Mr J—d. 2. Root. 15.

The appraisal by persons not freeholders though both parties agree, confers no title. 1 Sw. 336. 1 Root. 95.

It is said in the statute, that in default of an appraiser, one of the appraisers shall be appointed by the nearest justice. By this is intended every justice in the town or the nearest and prox. 1 Root. 9. 1 Swift 335.

The officer must return the execution with his endorsement on it, to the clerk of the town where the land lies, to be recorded, and to the office of the clerk of the court from which the execution issued, to be there recorded; and this completes the title. Stat. 282. 1 Root 499. 1 Sw. 336.

But though this completes the title yet the pltf must if required produce when examined in evidence under this title, the copy of the judgment for it may be varied. 2 Root. 57.

# Title by Execution.

Stat. 487. 557. The recording of the levy &c. by the Town Clerk only, or by the Clerk of the Board of Sup., is not sufficient. It must be done by both.

But the whole copy of the Town Clerk's record is not required. A copy of the record of the Coll. & Rand. 529. of the Court and a certificate from the Town Coll. is sufficient.

Smith v. Rochester Nov. 1811. A defendant may however, prevent the consummation of the title at any time, before the execution is returned for the sale, by tendering the money.

And by our Statute the whole interest of the debtor is to be sold, in the subject, as far as it is taken. If the debtor has a fee, the fee must be taken. If a life estate, the life estate must be taken.

Ibid. 334. It has been usual in Court to levy upon crops growing, and then to sever them, and sell them as personal property. But our Statute makes no such provision; and it would be legality of the practice. If the crop is to be considered as personal property, it must be sold at the end of 20 days.

Growing crops in Eng. may be taken by bona fide creditors; but that writ is not a creditor.

By our Stat. if judgment passes by default &

upon, & accepted abroad from the State, the officer when he takes and executes, must give a bond, to refund, if the offd appears and makes the income, within a year. Or else if this is not done, the judgment is erroneous, and will be reversed on writ of error. 2 Rev. 267. 1 Rev. 335-6.

But the parties themselves can take advantage of this erroneous judgment. Bond then cannot set it aside. This is a general rule of the Com law. 1 Rev. 176. 1 Rev. 335-6.

All executions must now be made returnable within 60 days, or if there are 60 days between the time of the execution, and the next session of the Court, which is given & must be returnable to that Court. But if there are not so many days, it may be made returnable to the next subsequent Ct. 1 Rev. 282. 1 Rev. 1. 2 Rev. 281.

If an execution is made returnable "according to law" it is returnable to the next term of the Court from which it issues, between which and the teste, there are 60 intervening days. 1 Rev. 261. 1 Rev. 283.

But all executions issued by single magistrates must be returnable within 60 days.

A thing after the returnday is void, and no title is acquired by it. Rev. 1. 1 Rev. 1.

If an officer does not return the execution during the life of it he is liable to the creditor

whether he has received it or not. The Land
Tell. 78. of the whole sum is collected in return, imme-
Par. Ex. 8. diately. But if the debt is not collected, a re-
2. Lu. 281. turn is required.

But if the officer has commenced levying the execution before the return day, it may be completed afterwards; for the whole is considered, as come from the time of the writ.

The levy of an execution does not and the debtor of his possession, but the debtor may immediately sue out an action of trespass against him.

Ld. Raym. 25. 1. Ld. R. 293 295–299. 2. Bac. Ab. Ex. 9.

It is not in the power of the officer to put the debtor out of possession and the debtor is, or some officer are in the actual possession of it, notwithstanding what they have done.

It is a general rule of the Comm. Law, as well as of some other, that if the levy of the first execution is ineffectual, the party can obtain another, by Sci. fac. and it is so in Virginia here, the same as in Britain, without such sci. fac.

Ld. Raym. 62. 4. T. R. 5. Bo. 86–7. Hob. 60. 1 Rand. 457.

If the debtor escapes from prison for a little time, and of commitment remains, the execution must be proceeded with. But the judgment is void, and incurable. So if the sheriff has taken insufficient bail in mistake and discharged the execution debtor, a new one may be obtained.

2. Lu. 281.

Bac. Ex. 8. Ld. Raym. 1. 5.

No Ca. Ex. can be an execution can not be pen-

generally, issue after a year and a day from the judgment without a scire facias. There is Salk 258. then, a strong presumption that the judgment has been satisfied. This scire facias is given in personal actions, by 8 & 9 Geo. II. c. 20, though in real actions, it existed at Common law. 60 L. 290. Cath. 30.

debt on judgment will lie at any time Mills v. Thomas Sup. Court 1815. debt on judgment plea "nil debet" [illegible]

In Cases where there is no time limited within which, it could be taken out. In one case it was holden, that it could not be, after 10 years. 2 Str. 551.

An execution can be prayed out by any party, who is paid or proves, to the judgment. Com. Ex. B. 4. E. 4. Mod. 9 L. 5. 7.

In real actions if the tenant dies after judgment and before execution, the heir at law is entitled to the execution. This is obtained by scire facias. But in personal actions, the execution belongs to the personal representatives. Bac. Abr. E. 5. Com. Ex. B. 2. E. Rhea 7. L. 13. Bac. Ex. D. Ind. 849.

Once if a party has obtained execution and dies, the writ may be executed without a scire facias, in favor of the heir or personal representative. Bac. Ex. B. 2. E. 4. Com. Ex. B. 2. E. Rhea 7. L. 21. Salk 322.

If an administrator recovers, the executor obtains judgment and dies before execution, the administrator may have the execution, though at common law, it was said he could not. Bac. Ex. B. 2. E. 4. Salk 319. Rhea 1072. Bac. 4. Bels. 89-4.

If judgment is given against him and

## Sale by Execution

Tho. Ewbank case of Parker said in case execution, the party
Lev. 90. could have execution in scire facias against heirs
Com. Dig. tit. Execution
(B).

If judgment is obtained against a well executor,
Bac. Ab. Exec.
B. 2. Bro. 281. he may have execution, reciting bond
Co. L. 289. in terrorem, to his heirs executors and administrators
Bro. J. 88. 2 and by scire facias against the land in
the hands of his heirs; and if personal prop-
Com. Dig. Ex.
Mar. 79. Mo. 6 and he dies, the heir may obtain execution
Mo. 8. 9. against the executor administrator.
Cro. J. 91.

And if the will after execution, then before the
Dyer
Bro. Ex. 18. original death death it may be executed afterwards
Vent. 218. without scire facias.

I do not know any law, that rule can be
accepted in Court than it ought to be so that
the average be then, since the indment or debtor
amplest of all his effects in case of the insol-
vency of the deceased.

Bac. Abr. Exec. B. 2. Co. 4.
Bro. Ex. 8. 9. If judgment against a certain person and
the hands of executors, before execution;
926.

it may then against the wife alone.

# Estates upon Condition.

An estate upon condition is one depending upon some uncertain event, by which it may be enlarged, created or defeated.

Estates upon condition are either conditional, or else upon condition implied, or else estate upon condition expressed. Besides the latter sort are certain bargains upon trust.

The estate which condition implies, is such as arises, when condition is annexed to the nature, and nature of the estate, itself. A condition implied is one raised by law and annexed to it. Thus, in the grant of an office, there is always a condition implied that the grantee shall duly perform the duties and upon breach a forfeiture occurs.

Cf. Co. Litt. 234 a.

Cf. Co. Litt. 201.

Cf. Co. Litt. 18.

Of is also a condition annexed to an estate that the tenant shall do and suffer something with it — as that tenant in tail, or in fee, shall not alienate, in order to keep the estate in his family.

An estate upon condition expressed is one to which is annexed some express qualification, by which the estate is to be created, enlarged, or defeated. Conditions expressed are either precedent, or subsequent.

# Estates upon Condition.

A fee simple, or any other estate may be made to depend upon a condition, so that the estate shall cease, or be enlarged, or be created upon the happening of some future event.

Co. Lit. 201.

A condition is a qualification, or restriction annexed to an estate whereby it is made to depend upon some uncertain event, so that if the event happens, the estate shall cease, or be created. The words by which a condition is created are "provided" "so that" "on condition" "upon condition" "provided" "so that" and words of similar import. The distinction between a condition and a limitation is, that the former is a qualification, the latter is, that the event upon which the estate is made to depend, must happen within the period of the duration of the estate, or it will be void.

Co. Lit. 20. a. 203. b. 2. Bl. 154.

Co. Lit. 2. b. 78. b. 5. b. 7. b. 8. b. 18. R. 17.

There is a distinction between a condition precedent and a condition subsequent, which is called a condition in deed. The former is a condition, on the happening of which the estate is to commence. The words "until" "until" are words of limitation. The words "upon condition" "provided" "so that" and words of similar import are words of condition.

Co. Lit. 201. b. 3. 80. 3. B. 241. 2. Mt. 185.

The distinction does not seem important in its results. But if the qualification is a limitation, the event, that is, the event upon which the estate is made to depend, must happen within the period of the duration of the estate, or it will be void.

# Estates upon Condition.

Lord Coke says an estate is said to be upon condition, when by the act of the estate there arises, beyond the time of the grant, a right to the land to who is in expectancy, which hereafter will lay claim or enter.

Lord Coke 2. Inst. 327
2. Co. Litt. 201
2. Wms. 55

But the distinction seems now to be very unnecessary. For if words of condition are used still if on breach of the condition, the estate is limited over to a stranger, the qualification is construed as a limitation, and not as a condition. The reason is that if it were treated as a condition the estate could be avoided only by the act of the grantor and their not can under the crown by the prerogative or heirs. So in this case the remainder-man would be deprived of their remedy since they have no interest in the estate. The entry common is made by the grantor to the condition.

Co. Litt. 218.
Bac. Ab. Tit. Condition

Where a lease contains a condition to have an entry for the breach of some of the covenants a strict entry is necessary, to enable the lessor to maintain ejectment.

Co. Litt. 202
Bac. Ab. Tit. Condition 406

The reason for this is to be found in the tenderness shown of the Courts against forfeitures. For there the law is seen always to yield unless it will compel an entry on another or

# Estates upon Condition

It was formerly [illegible] that a condition annexed to a lease, that the lessee should never assign, was void. For it was said to be inseparable from the estate. But it is now settled, that such a condition is good.

If a tenant in fee [illegible] in fee simple to one [illegible], it is void, [illegible] the [illegible]. But [illegible] to a [illegible] to [illegible] he entered [illegible] [illegible] [illegible] in his [illegible].

[illegible] [illegible] a lease to A and his executors, a condition that the executors shall not [illegible] [illegible] void. But it is [illegible] it is, and for the same reason as before.

A condition in a lease, that if the lessee become a bankrupt the estate shall cease, is good and will bind the assignees in bankruptcy and all his creditors.

And, finally, it seems now to be settled that a [illegible] in a lease, that the [illegible] [illegible] consent of the lessor, is a [illegible] of the same [illegible].

# Estates upon Condition

If one devises an estate to a stranger, or any other person, upon a condition, which is impossible, or against reason, or against law, the condition is void, and the devisee may enjoy the estate absolutely, notwithstanding the attempt, made by testator, to restrict or limit it.

If an express condition subsequent be annexed to an estate, is impossible, or against law, the estate is absolute, as if there was no condition. For that impossible condition is void. For the law will not the devisee with the advantage of attempting to enforce a condition, commonly, not, which is thus rendered impossible.

For real or the same, if the condition is possible, and it afterwards becomes impossible, by the act of God, or by the act of the grantor. Or, if an estate is limited to A. on condition to be void, in case A. marries B. in a limited time, and B. dies before that time arrives, the estate is absolute in A. For "actus Dei nemini facit injuriam." Suppose also, on a limitation in a deed, the grantor limits without the time mentioned, marries B. he shall not avoid his estate of a thing of which he himself is the cause.

If a condition subsequent be annexed to an

# Estates upon Condition.

[illegible] subsequent [illegible] be [illegible] the con-
dition is void, and the estate absolute. As
if the condition be that the grantee shall
commit a murder &c. [illegible] estate [illegible]
[illegible] person, to make the [illegible]
void; for [illegible] the grantee [illegible]
ment to commit the act.

So also, if [illegible] be granted [illegible]
condition, that the grantee shall not alien,
the condition is void. For a power of alien-
2 Bl. 157 ation is inseparable from the estate.

But if a condition precedent be [illegible]
Co. L. 206 ble, the estate itself [illegible] the condi-
tion is void. For the estate cannot vest until
the condition is performed [illegible]
formance [illegible] can never
confer a right.

Pow. [illegible] 55–56. Ba[illegible] 90 The performance of a condition [illegible]
[illegible] and favourable in law.

Under the head of estates upon condition are
[illegible] estates [illegible]
in pledge.

# Mortgages, general nature of, &c.



There are two kinds in practice, one of them sort.

1. The first is called vivum vadium, which is when lands are made over by the debtor to his creditor until out of the clear profits he has received his debt. 30. Ass. 5. Pow. Mt. 4. 2. Sh. 5. 157.

This species of pledge is called a living pledge because it secures the debt and the discharge of it, results to the grantor.

2. A pledge of the second kind is called mortuum vadium, dead pledge, or mortgage.

A mortgage is an estate granted by a debtor to his creditor, with condition, that if the grantor pays the debt at a limited day, he may enter and resume his estate or that the grantee shall recover, or that the grant shall become void. 2 Bl. 272. Bro. 20. Pow. Mt. 4.

This species of pledge is called a dead pledge because that, if the mortgagor fails to pay at the day, the estate as to him is forever gone at law, and without a possibility of recovery. 2. Th. 154. Co. 6. 347. 469. 45 a. Pow. Mt. 4. 13. 168.

A mortgage then, is an absolute pledge by a debtor to his creditor, as a security for his debt. The grantor is called the mortgagor and the grantee the mortgagee. The word mortgage strictly denotes the estate pledged, thus, as it is often used to denote the deed.

# Mortgages.

The [illegible], [illegible] is effected by a condition or defeazance. And it may be, either inserted [illegible] with the deed [illegible] annexed to it, or it may be written on a distinct piece of paper. For it is a general rule, that two distinct instruments, executed at the same time and relating to the same subject, form but one agreement. This presumption, that these instruments have a reference to each other [illegible], [illegible]. Thus if the grantee gives back a bond, or covenant, binding himself to reconvey the land on the payment of the debt, this bond or covenant not referring to the original deed, will not, it has been decided, make it a mortgage.

Smith v [illegible] 1809.

As soon as the mortgage is executed, he has a right to take immediate possession, tho' his title is liable to be defeated, by the performance of the condition. But the legal title, till defeated, vests in the mortgagee, who may maintain ejectment against the mortgagor.

Pow. M. 16. 16.79 80

It is usual, however for the mortgagee, to suffer the mortgagor to remain in possession.

There is a distinction however between a mortgage given to secure a [illegible] or indemnity, and one given to secure a debt.

Mortgages

In the former case a tender of the money at the day, discharges, not only the mortgage, but the whole obligation — for the mortgage being discharged no debt remains. Co. L. 207. a. 207. Ab. 575-8

But on the other hand, when the mortgage was given to secure a debt, though a tender at the day discharges the land from the incumbrance, an action may still be maintained for the recovery of the debt. 9 Co. 77. Co. J. 246

The condition of a mortgage deed was formerly considered as a condition precedent, but certainly there never was any colour for considering it in that light. Conditions, in this relation, are always received in regard to the estate created, which is here defeasible on performing the condition. Rem. N. 7 Co. L. 205. 213. 221. 1. Co. 22.

Formerly, upon the forfeiture of a mortgage in fee, the estate being absolute at law, the mortgagee was subjected to all his real charges, such as dower, &c. It became usual in consequence of this rule, to make mortgages of long terms in trust for the creditor. And the practice is now continued, though the reason for it has ceased. Co. L. 221-2 Ry. Co. 1. 311. Co. 191. 3. Rep. 62. 2. Bl. 1. 58.

It is not unusual in the English system of conveyancing, for the mortgagee to give a bond or covenant for the performance of the conditions, and agreements in the deed, though it seems to be unnecessary. But when such a bond is given, not paying at the time,

2 Ler. 116 3 Keb. 907 Cro. J. 281 Cyc. 286 Com. 286

time, is a breach of the bond as well as of the mortgage. It was formerly holden otherwise.

At com. law, if the condition of the mortgage is not strictly performed, the estate vests absolutely in the mortgagee. In consequence of the hardship, thus imposed upon mortgagors, originated the contest between the courts, and equity repairing the evil.

In equity, mortgage was regarded as a mere security for the debt. The debt was the principal, and the mortgage the incident.

Fow. Mod 169 Fow. 170

Hence the court of equity treat the mortgagor as the owner of the land, and the mortgagee even after the forfeiture as a mere trustee for the mortgagor, until the debt, and interest, shall be paid.

This equitable right which is left in the mortgagor, after forfeiture, is rather the equity of redemption, and this is known, only to the law of equity. Still, however, until redemption or foreclosure, the mortgagee's interest remains in equity, rather an equitable lien to secure the payment.

9 Mod 196 Fow. Mod 156. 169

The equity of redemption, strictly speaking, does not arise until after forfeiture. Before this time, the court of equity have nothing to do with the mortgage.

From the view of the subject, it follows that a mortgage is not merely an alienation, or absolute conveyance, but a security, or a lien upon the land, or chattels

Mortgages.

in such disposition is not fairly afforded by it. If for instance a voluntary settlement and afterwards mortgage the same premises, the first settlement is recorded only from trustees, and the parties claiming under the settlement may redeem on paying up the mortgage. 1 Ram. 182. 324. 342. 2 P.W. 639. 1 Dick 368.

How far a revocation of a devise is construed to arise from a subsequent mortgage will be treated of hereafter. "Devise." Ram. D. 599. 614-8. 1 Atk. 90. 3 Atk. 798.

Every contract for the loan of money or the forbearance of a debt secured by the conveyance of land when the conveyance is not considered as a disposition of the estate is in equity considered as a mortgage. And it has become a maxim in the law of equity "once a mortgage always a mortgage." 2 Atk. 495.

The true meaning of this maxim is that all agreements between the parties at the time of giving the mortgage for the purpose of preventing a redemption, if the money is not paid at the time, are void. This may in a general in policy to prevent a dangerous power being taken of the exception of the mortgagor. Thus an agreement that if the mortgagor does not redeem within a given time he forfeits his equity is void. 1 Ram. 55. 160. 2 Stokes 164. Ram. R. 19. 28-29-9.

2 Com. 84. Com. R. 513. And in the application of this rule, it makes no difference whether the romance is placed by the mortgagee alone, or is contained in a separate instrument.

Also so corruptibles is the law of equity that an agreement at the time of paying the mortgage, that the conveyance shall be absolute, provided the mortgagee will pay an additional sum, and the time of the forfeiture, is void.

2 Com. 198 488 2 Com. 520 2 Eq. Ca. Ab. 599. Com. Dig. 267 But an agreement to give the mortgagee the right of preemption in case of an equitable sale is good and may be enforced.

A subsequent agreement, for the sale of an equity of redemption, executed between the parties is good — also the rule would be carried to an extravagant length.

So also, if after the mortgage is made, the mortgagor releases to the mortgagee, the equity of redemption, upon condition that if the conditions are complied with, the mortgagee shall reconvey, is good and will be construed strictly.

Com. 264 2 Eq. Ca. Ab. 596 Fall. 61.

Again, in cases of family settlements, where the transaction is between members of the same family, and where a deceptio or fraudulent is intended, in a certain event, to the mortgagee, there is an exception to the maxim, "once a mortgage always a mortgage."

Mortgage

A where one made a mortgage to his Homeman, and stipulated to be void, if the money was paid on the mortgagors life, the heir was not under the circumstances, allowed to redeem.

In this case, there is no example of impositions upon the mortgagor, when the mortgagee was in treaty for it. A mortgaged land to his brother, without an agreement, that if A had no issue the estate should be absolute, and the agreement was holden void, to exclude the heir from redeeming.

1 Bruk. 764
1 Vern. 7. 199.
214. 232.
2 Eq. Ca. Ab
595.

There is a class of opinions, which go to establish the doctrine, that an absolute deed, may be considered as a mortgage in certain cases viz. when an agreement to redeem is inferable from circumstantial facts, where there can be no charge of perjury. But, I ask, how is it possible, that those facts, which when proved imply such a parol agreement, can constitute an absolute sale, (without any defeasance) a mortgage; when since the statute of Ch. II no more trust can be created by parol. Surely an agreement in writing cannot be presumed, or implied from these facts. But it is said that this parol agreement is only void, under the 4th, because it cannot in ordinary cases be proved from some circumstance inherent in the deed, or in a parol agreement.

Fall 60
Ross v. Ross 28
Ross v. Wal
2 Wood 95
2 Oth. 7
Lord P. v. Whitehorne

There has been no precedent cited in point in this. But in some of the decisions cited the opinions are not law in the Supreme Court.

Mortgages.

Schedule whether the mortgage is considered as conveyance in Westminster Hall. Since the trial at Hereford, Worcester, and Coventry, the Judges have been disposed to construe the Statute of Frauds & perjuries strictly, and according to the letter of the enactment. I confess I can see no practical harm from adopting these opinions, though it might cost lawyers a little more trouble.

Bacon Abr. 90. Bro. M. 53. 6. But it is above, however, that parol evidence is admissible, to prove the honourable of the money due on the mortgage, for this is a matter collateral to the mortgage.

It also appears that the nonpayment, from which the said, that fact may be proved by parol, it is a collateral, extrinsic fact. The debt is the principal, and what extrinsic matter the debt extinguishes also its incident, the mortgage.

Mortgagee. Estate of the mortgagor.

Regularly, the mortgagee has a right to the immediate possession of the mortgaged premises. Co. p. 659.

If however, it is agreed, as usual, that the mortgagor shall remain in possession, he is regarded as a tenant for years. Bac. 667.

But if he remains in possession without agreement, he is considered in the nature of tenant at will. This rule, however, regards, merely, the possession. For the mortgagor is still considered as the owner of the lands. Dougl. 21-290-3. Co. p. 659. Cowp. 449.

He is, however, in some respects, in a different situation from a tenant at will. He may be sued in ejectment, by the mortgagee without notice to quit, which an ordinary tenant from year to year, is not liable to. Co. p. 660. Co. 6. 303. 5. Doug. 22. 1 Str. 606. Qu. whether without demand. but a decision 2 Burr. R. Rockwell v. Bridg. 5 Johns. R. 3.

On the other hand, a mortgagor in possession, is not, like ordinary tenants at will, liable for rent, because he is bound to pay the interest of the debt, for which the land is merely pledged as a security.

But if the mortgagee exists the mortgagor, between the time of sowing and harvest, the mortgagor is not entitled to the emblements, because the whole land and crops grown upon it, are pledged to secure the debt. Doug. 22. Burr. 1. 1. 5. 70. 80.

## Mortgages — Estate of the mortgagee

A common tenant at will, can convey no his interest, undebt to another; for this would be inconsistent, determine the estate. But a mortgagor in possession may make a lease to another, unless the mortgagee chose to defeat it. He may at his election, treat the underlease, as his lease, or as a disposition. The lease of the mortgagor in possession, is then in the same situation, generally, as the mortgagor.

Kent 2 L. 3. p. 140. n. b. 308-9. 1 Sw. 3 Bosw. 144.

Hence the lease of the mortgagor, is liable to be avoided by the mortgagee without notice.

It seems to follow, also, that the underlessee if evicted, would not be entitled to the emblements any more than the mortgagor. This point has not been decided judicially, however.

If the mortgagee give notice to the underlessee to pay rent to him, the latter is bound to pay him, as well had a lease in his name before the notice, as that which appears afterwards. If he pays it, after notice to the mortgagee it is at his peril.

1 Atk. 34 Doe v. Bell

The mortgagee, when sued in ejectment by the mortgagee, cannot set up the mortgagee's title in a third person. He is estopped from doing so in order that the mortgagee may be in the mortgage possession.

The rule is the same when the under lease is made in operation, by the mortgagor. He is therefore prohibited from asserting that the lease is in the mortgagee. 1 P. R. 160 7 Ed. R. 480 Rem. R. 169.

On the other hand, the mortgagor having made a lease, cannot deny the interest of his lessee, during the continuance of the lease. Cro. C. 304 Ch. Ca. 59.

He is affected by estoppel, again.

Such, clearly, the lessee of the mortgagor in possession, may maintain trespass against any stranger. For the lease title is good against all persons, except the mortgagee. Rem. R. 71

It is now fully settled, that a mere bare possession is sufficient to enable a tenant to maintain trespass against a stranger.

The mortgagee lessee may redeem, as the mortgagee, for he is interested in the equity of redemption.

But the mortgagor is deemed in many cases, in law, and always in equity, as the real owner of the land. The mortgagee's interest is considered as a mere chattel. If then a freehold is mortgaged, the mortgagor still holds the freehold. So that, whenever the law requires a freehold to pass a settlement, the mortgagor will be entitled to use, from his interest in the mortgaged premises.

Hence, an equitable assumption accords to the

Mortgagor. Estate of the mortgagee.

Dan. p. 610 Lien of liens. In mortgages an interest only passes as devises under the words land, tenements, or R.E. And finally it is appropriated like any other real property.

2 Bing. 304
2 Bur. 978
2 Ch. R. 294
2 P.W. 341
1 Atk. 605

But if a mortgagor in possession commits waste, a Ct of Eq will restrain him by an injunction. Now it is impossible that an action at law should lie against him, by the mortgagee, when only a term is mortgaged.

1 Atk. 727

It seems to follow from this rule, namely, that the mortgagor does not forfeit his right of tenancy at will, by committing waste.

## Estate of the mortgagee, before forfeiture.

Formerly, upon the execution of the mortgage deed, and before forfeiture, the mortgagee's interest continued, as it was a Ct of mere mortgage before Ct of Eq. gave relief.

2 Jem. 156.
Prec. Ch. 483
Jem. M. 79.
C. 26.

For this jurisdiction commenced only, with the equity of redemption, which accrues after forfeiture.

Hence, any conveyance, or release of the subject-mortgaged, made by the mortgagee after forfeiture, is said to be void as against the mortgagor. The rule is said, strictly incorrectly. The conveyance is only voidable, and may be confirmed by the mortgagor. Were it absolutely void, it could not be confirmed

Dyer M. 30

Mortgages — Estate of mortgagee before forfeiture.

On this principle, is founded the rule that the mortgagee may an action, compel the mortgagor, in all cases, to pay rent to him. Doug. 201.

And this rule holds, even where the lease was made prior to the mortgage. He is entitled to rent, on the ground that it is incident to the reversion; though he cannot enforce the lease.

But I conceive, that he cannot compel the payment of rent which was due to the mortgagor before the mortgage was made: For that had, already, become a debt, due to the mortgagor.

When a term for years is mortgaged by a termor, the mortgagee is in the nature of an assignee of the term, provided the whole residue of the term is mortgaged. Otherwise, he is considered only as a sub-tenant.

But tho' the mortgagee is, in the last case, considered as an assignee, yet he is not liable to pay rent to the reversioner, unless he takes actual possession. For the mortgage was not regarded as a purchase. 2. Term. 275. 374. Doug. 428. 444

But if he takes possession, he is liable, upon the covenants, to pay rents. Co. Lit. 115. Burth. 72.

This rule obtains as well after forfeiture, as before.

# Estate of the Mortgagee after forfeiture

After forfeiture, the mortgagee has, in Eq.
1. Atk. 608 ity, only a chattel interest — even though
Prec. 610 694 he has recovered, in ejectment, against the
mortgagor, and taken possession. For a
recovery in ejectment gives him no greater
estate, than he had before.

Hence the interest of the mortgagee
will end, even after forfeiture in equity,
half in a service under the covenants
2 Vern. 621. of "Quiet," "Enjoyment" and "Quietly to
1 Vern. 39. Sell." If the
1 Salk. 157. mortgagee, who makes the service, however,
Bac. Ab. 107. 171. has no other property in lands, the word
"proceeds" (had in his interest in them)
will pass, on the record, in the action.

And the interest of the mortgagee remains
Vern. 367. Bac. Ab. 92. 170. a chattel, until foreclosure. In this state,
therefore, it goes not to his heir, but to his
personal representatives.

From the view, I have already taken, of the
interest of the mortgagee, and particularly
from the maxim, that the debt is the prin-
1 Bl. 458 cipal, and the mortgage the incident, it
1. Rand. 246 follows, that any assignment of the debt
Bac. Ab. 388 459-4. also, or of the bond, or note, carries
with it, the mortgagee's interest, in the mortgage,
though it is usual to convey it in a separate
instrument.

Mortgagor's Estate after forfeiture.

The mortgagee cannot be foreclosed
on any ground, which would injure or en-
cumber the mortgagor's right. Then on a
bill by the mortgagor to redeem, it would
be no answer, for the mortgagee, to say that
he had made a lease which was not yet
expired. The Lord Chancellor in that case
says that the mortgagee, before foreclosure, cannot
lease the premises, to bind the mortgagor, unless to
avoid an apparent hardship, & from manifest concealment, in any case.

As a mortgagee in possession, cannot commit
wilful waste, so neither may the mortgagee, after
he has foreclosed.

However, the security is enlarged, or
if the subsequent mortgagee is not sufficient,
a mortgagee in fee, may commit waste,
such as cutting timber, &c, though he is o-
bliged to apply the amount to the payment
of the debt. He can never, however, commit
unfeasonable waste. And, in all cases where
the mortgagee actually commits waste, which
is wrongfully done, he must account for all
that he has taken from the freehold by ap-
plying the amount first to the payment of
the interest, and then, to the principal.

The mortgagee is allowed all necessary
expenses incurred in repairs, &c for the
preservation of the estate.

Eq. Ca. Ab. 610

Ibid.

Cow. 9 Com. 392. 1742

Cow. M. 95

8 Atk. 727.

Wms. 34. 3 Atk. 318. Mortgage 81.

## Mortgagors Estate after forfeiture.

By a mortgage is meant an estate in which the mortgagee has no interest, and the true owner afterwards conveys it to him, as his security to live.

2. Bacon 11
1. B. & P. 40.
Bac. M. 97.

The mortgagee will have the benefit of a second conveyance. This is called a crept from the old Stock.

7. Bro. P.C. 432.

If the mortgagee of a term, obtains a new term, he will hold it in trust for the mortgagor, for the mortgagor, tho' the fund for as the original term, was the same of the 2d mortgagor should have benefit.

A mortgagee in possession is not bound to expend money, except for necessary repairs. But if he does expend money in defending the mortgagor's title, he may add this expense to his debt. The mortgagee takes possession of the chattels, merely, to satisfy his debt, and not as a purchaser.

3. Atk. 580-510

The mortgagee takes the estate subject to all the incumbrances to which it was subject in the hands of the mortgagor. If then, the mortgagor in possession, forfeits his estate, the mortgagee's interest determines with it; except in a single instance: suppose a tenant for life or years, having mortgaged his estate, commits waste. The determines his estate in favor of the remainderman, who is not all to be affected by the interest of the mortgagee.

2. D. & W. 146.
Bro. P.C. 574
591. 106. contra.
Bac. M. 99.

But to this rule there is one exception; if the mortgagor forfeits to the crown, he remains, the fund obtains, as the equity of redemption, with an upon interest held by the mortgagee.

Bac. M. 111.

# Equity of Redemption

The equitable right, remaining in the mortgagor, after forfeiture is called the equity of redemption: his interest is rather a trust or trust-estate; for the legal estate is in the mortgagee. 2 Atk. 608. 2 Atk. 526

sec. and he is considered as trustee for the mortgagor, if the legal title till after foreclosure.

The mortgagor has a right to claim the legal title, when he shall pay the debt and interest.

As the mortgagor may at any time redeem, paying the principal and interest, so may any other person, under him, having an interest in the subject-mortgaged; as for ex: a judgment creditor, may redeem, of a subsequent mortgagee, as against whom the judgment was fraudulent. Ferr. 73. 1 Sch. & Lef. 315

If the mortgagor becomes a bankrupt, his assignees may redeem; for they are entitled to all his interest and estate, whether legal or equitable. 1 Br. Ch. 71

If the mortgagor makes a release, he yet may redeem. Doug. 22.

If the mortgagor assigns his equity of redemption, his assignee may redeem. 1 Ven. 77. 490.

If the estate mortgaged is an inheritance, upon the mortgagor's death, his heir may redeem. If an estate for a term, or other chattel is mortgaged, his personal representative may redeem. 2 Ch. 3.

# Equity of Redemption

An equity of redemption is governed by the
2 Ken. 304 same rules of descent as legal estates. If
the estate mortgaged is an inheritance, the
equity in Eng. descends to the eldest son &c.

And as the heir may redeem, so also the
2 Ken. 378. devisee of an equity of redemption, may re-
Ken. Ch. 109 deem. It is the interest which is sold for
the heir at law.

The judgment-creditor of the mortgagee, may
redeem, for the judgment in Eng. is a lien upon
the estate. But, however, it not the law in Conn.
3 Ch. 200
1 Ken. 399. Here, except in the case of general creditors, debts
2 Ch. 140
10 L. 102. contracted in the matter last illustrate no priori-
106. ty of claim is known.

But, though a judgment creditor, cannot redeem
yet a judgment creditor, having levied his
execution on the land may redeem. This prac-
1 Day. 93 tice of levying executions on equities of redemp-
tion is common in Conn. though unknown
to the common law. And this proceeding
vests the mortgagee's right, absolutely in the
creditor. The equity is appraised and sold
precisely, as a legal estate.

In Eng. the king may redeem, when the
1 Mod. 128 mortgagor has forfeited his interest by the com-
mission of treason.

The widow of a mortgagor having a dower

# Equity of Redemption

[illegible] the owner, [illegible] to redeem, [illegible] though the interest is less than the value of the equity, he [illegible] must redeem the whole; and the [illegible] bar can not to the redemption of part. (1 Rom. 197. 1 Sy. Ch. Ch. 222.)

These rules however regard [illegible] made [illegible] the mortgagee: for if the mortgagee was [illegible] (Rom. Ch. 2 - 2. 112.) [illegible] the mortgage, her title is paramount to that of the mortgagee and he may force it in equity again.

Most of a mortgage of an estate mortgaged, however, [illegible], in [illegible] and the estate, payes on redemption, more than one third of the debt due, he and her representatives may hold the estate, until the heirs shall reimburse the two thirds. (1 Rom. 19. 1 Ch. Ch. 271.) [illegible] to bear one third of the debt if the divided in the incumbrance; but (Rom. Ch. 313-7) otherwise the, after redemption, can hold it [illegible] him at law, ~~may hold~~ till he reimburses the whole.

Where an equity of redemption is vested in a married woman, her husband, during the [illegible] marriage, as tenant in the estate. (1 Atk. 603. Rom. Ch. 1 2. 52.)

On the other hand a mortgagee [illegible], [illegible] by the Ecc. Ct. [illegible], tenant in dower of the equity and therefore cannot redeem. In [illegible] there is no such reason in the [illegible]. The reason has been given [illegible]

to exist; the rule having been established upon the interposition of the court of equity; when the legal, as well as equitable estate, was in the mortgagee whose wife and third time was considered as entitled to dower.

The rule as to courtesy was adopted at a later period. The rule as to dower is otherwise, in form?

But to entitle the husband to courtesy, in the wife's equity of redemption, or any other equitable trust estate there must have been a seisin of the husband, covering the coverture. There must be what is allowed in equity equivalent to an actual seisin at law; as possession and receipt of rents and profits. There cannot be a legal seisin of an equitable estate in fee at law, the mortgagor is considered only as tenant at will.

1 Fonb. 294 297 If there has been no seisin which is vested in equity equivalent to a legal seisin as if the estate was holden in trust for the wife, and separate use of the wife, the husband having had no seisin, is not entitled to courtesy.

A subsequent seisin cannot revest of a former one, and then he will be entitled to hold the estate, till the mortgagor shall pay the money.

So too, if a tenant makes a mortgage, or a recovery is obtained against him and there is a lien on his estate, it may redeem. 2 Rom. 657 7 Mass. 52 Rom. 194

If a subsequent mortgagee, or judgment creditor, or a lessee of the mortgagor or assignee, the mortgagor may redeem out of his hands; tho' this rule is not laid down in the books. Whenever he, who redeems, has not the whole equity, inconsiderably, he who has the residuary equity may always redeem out of his hands. 2 Eq. Cas. The second mortgagee redeems of the first, he has now become the owner of the equitable and is now the only incumbrancer, but he is entitled to hold it only until the two debts are paid. Thus there is always a residuary equity in the mortgagor, if paid by the fact that he may make an indefinite number of subsequent mortgages.

So also, the heir of the mortgagor, or the assignee of the equity may redeem in like manner.

We have here once determined, that the mortgagor may redeem, even after a release of his equity of redemption, where it appears from circumstances, that the release was made upon a corrupt trust, for the benefit of the mortgagee, or where the sale is grossly unfair, contrary to the rules of the court. Cases are of origin a great age.

# Equity of redemption

An equity of redemption is a right in the tenant for life, with remainder or reversion in fee, three-fourths, or redemption can be pro proportionable: or the tenant for life one third, and the remainder-man the other two thirds; and the life is estimated at 1/3 of the fee.

Ca. t. 221 If the tenant for life, however, is compelled
Prec. Ch. 44. to pay the whole, he and his representatives
62. may hold the land until the remainder-
man will pay his proportion.

Prec. Ch. 44 It is agreed, indeed, in one case that the
tenant for life shall pay two fifths. That however
does not appear to be the rule.

If the mortgage money is payable at a
Ch. Ca. 223 future time, he in remainder or reversion
Pw. Pr. 121. may guard himself against the liability
442. 444. of being obliged to pay the interest, by a bill
"quia timet," to compel the tenant for life, to contribute,
that is, to keep down the interest, or quit the possession.

If a tenant for life pays the whole sum on
redemption, and makes improvements, and
2 Eq. C. A. dies the remainder-man &c, must, besides his
590 two thirds of the sum, pay two thirds the value
Gill. Eq. R. 69. of the lasting improvements. But he is to
pay no interest on the money advanced by the
tenant for life; since the latter is bound to keep
down the interest, while in possession.

As to the proportion of the mortgage debt to be borne in the redemption, and the re-assignment, it is said, there is this distinction to be taken — that if the application for redemption is made before the death of the tenant for life, the remainderman must pay two thirds; but that if the application is made to the representative of the tenant for life to redeem after his death, he is to be taken only the proportion which his value bears [illegible] Rom. Eq. 404 Rom. Eq. 404

[illegible] "Thus rule seems to be reasonable enough, though not entirely consistent with some other rules."

The Equity of redemption upon a mortgage in fee is not assets at law. Indeed no equity of redemption whether on a mortgage in fee or not, is assets at law. The common law does not recognise such an estate as an equity. If then an equity descends to the heir, and he is sued on an obligation in his ancestor [illegible] 2 Atk. 224. the heir may plead "nothing by descent." But in stand an equity of redemption is assets, and the bill will follow a sale, when necessary, for the payment of debts.

If the heir redeem, he is still liable in the place of a third person. He is still liable in the place of the ancestor, and the money received on it is to be the value of it, to pay debts. 2 Com. Ch. 1. P. 411 1 Atk. 461 2 Atk. 224.

# Equity of Redemption.

An equity of redemption in the lands of an heir, is not however liable to be taken in execution, nor subject to be sold for debts owing by the heir at the time of his decease. But as the equity of redemption is descendible and when the equity is sold, on application of the creditors, it will be assigned pro rata between all the creditors, as well simple contract, as specialty creditors: for no priority of claim is recognized in Equity.

The Court of Equities of redemption are a species of law, and are liable to sale, for the payment of all debts. Indeed they are now treated pro-rata, as goods & chattels.

And in England, the mortgagor's reversion expectant, on the determination of a mortgage, for life, or years, is legal assets, though not the equity of redemption. — Crachelow Plow. Rep. 25- 1 Rum. 410. 1 Salk. 254.

For, even if have indeed a second the heir, in the ground of his reversion with a second executory devise the reversion comes into possession. Suppose an heir devises a term for 50 years, mortgages it for 20 years — then is then, a reversionary chattel interest remaining in him, which, if he dies at the expiration of 10 years it goes to his exec.rs. Upon second may be recovered against him with a second executor &c. infra.

The incumbrances are [illegible] the equitable owner and accessorily.

In a [illegible] Equity, tenants the creditors are and compelled the rent or executor to sell the remainder attached for the payment of their debts. They must wait until the remainder was due.

Though, generally, debts have no priority, when the fund is equitable & of a testamentary paper shall have no assets out of the equity in preference to any other creditors. This rule is merely equitable, nevertheless, when the real estate is in the testamentary paper. But as he has in lieu which bind on other creditors be have until they proved strictly in equity equity. A [illegible] of debt cannot take away a lien from a bona fide purchaser.

There is no instance in Eng. in which an equity of redemption has been attached in execution in the lifetime of the mortgagor. After his death, it cannot be taken because it is then equitable assets, and the creditors are paid pari passu.

Blake v. Gray "no person is entitled to recover unless he is entitled to the real estate." This is properly a sound, per the rule of law. A more would be unsound to recover of his estate.

The inference is, that no person is entitled to recover unless he has a right title to the property.

2 Bro. 61.

1 Ferrard.

2 Atkins.

2 Eq. Ca. A. 605 Ven. 182.

# Equity of Redemption.

Thus, tenant an equity of redemption was established. The heir devisee was not permitted to redeem, because he was willing to take his chance with the specialtee.

Barnard. 90 If however he who has a title to the equity, refuses to redeem, any other person interested can in the redemption mean.

So also in common cases of the heir of the mortgagor will redeem, the creditors may not; but if he refuses, they may then redeem to secure the payment of their debts.

It is a fundamental principle that in the rights to an Equity of Redemption is a mere creature of a Court of Equity that Court will always make it subservient to the same rules & the rules of substantial justice.

It is a first principle in a Court of Equity that "he who seeks equity must do equity. Hence

2. Ven. 350 1 Ch. R. 170 Cases. 601 Rep. R. 187. 6 Ed. when a bill for redemption is preferred, the Court of Chy will impose such terms on present in the application as it may deem necessary.

Thus when a mortgagor applied to redeem on payment of the debt provided he could not sell under the mortgage for a lapse applied the

2 Ven. 326 Chy Lord that he should not be indulged in that alternative. He was compelled to redeem without attempting to divide the mortgage or abandon the application.

Cases on the same principle as mortgages are law, principally attempted to avoid the mortgage on ruin, after a decree appointing to account, Ch. will compel them on receipt to pay all the expenses of the broad law.

Pow. Mo. 137 + 42.

The mortgagee can never compel the mortgagor to redeem before the day of payment arrives unless in case of a bond bearing interest.

Pow. Mo. 394

The mortgagor he will be permitted to redeem before that time, as when the value of the estate is such, as more than to pay off the debt before the day of payment be for, I suppose the mortgagee could not be compelled to redeem.

Pow. Mo. 137

If the mortgagee on application for redemption appears to have committed any fraud then the mortgagor he must redeem that off. before he can be permitted to redeem.

Simon Pl. Mortg. 457.

2 Jac. Ca. 1797.

If a person mortgages one thing at first, to secure one debt and afterwards, mortgages, to the same person another piece of land to secure another debt one of which securities is sufficient and the other not he will not be allowed to redeem the one, unless he will also redeem the other.

Pow. 107 + 286

Pl. Mo. 49 + 4.

So also if one makes two mortgages to the same person, and one and the first redeem

2 Rom. 207. 4 Rep. Ba. Ab. 325. Rom. 245.

It would be said to be unjust to redeem a term, he will not be permitted, unless he will redeem the lease. But if the heir claiming title to one of the prior mortgages under an elder title, and incorporated by an ancestor, he may then redeem the other, without redeeming the. Otherwise he would suffer an injury.

2 Ch. Ca. 19. Rom. Eq. 150.

If purchaser of the mortgagee's interest, will hold the land against the mortgagor, and his heirs, for the money upon the mortgage tho' he paid less, on the assignment.

Rom. 330. 481-486. Sa. 155.

But an assignee of equity in consideration, as creditor, such a purchaser, will hold only for what he paid.

1 Rom. 44. 2 Ch. 358. 468-470.

Lak. 155. 18. Ca. 270. 2 Rom. 253.

Equity mortgagee may then redeem for the sum.

The rule is the same, with a little extension, when the purchaser is a creditor the heir, or a part of the mortgagor. If the purchaser had a discount not on the mortgagee's conditions, but even his creditor should have the advantage of this discount rather than the mortgagee.

Rom. 2. Ch. 341. Lak. 155.

If the mortgagor is indebted to the mortgagee, otherwise than upon the mortgage, he cannot redeem, unless he pays what is due: for he who seeks equity must do equity.

This is the case when the mortgagor applies to redeem. But if the mortgagee applies to foreclose, he cannot require the payment of both debts, to prevent a foreclosure. The remedies of the parties are here compared, and the mortgagee being sue the debt is not subjected to have terms forced upon the contract, imposed upon him. For he does not come into Eq. absolutely in equity.

In the Supreme Ct of Connecticut in the case of Bottomley v. Fairchild, there has been a deviation from the latter part of the above rule.

The rule that the mortgagor applying to redeem, shall pay both debts, before also appears to be law, so far as separate bond debts; but he is not liable, on law, to pay simple contract debts. If his law were allowed to be, he would immediately be liable to an action on the bond which would be no bond.

The same rule which applies to the case where an interlocutory is mortgaged, holds, provided the personal representatives, when a chattel is mortgaged. The ex.r or adm.r, on applying to redeem, must pay both debts.

But if the one personal chattel is redeemed, and the field of them remain, and in addition to his [illegible]

1 Vern. 46. 244. Salk. 84. 2 Eq. Ca. Ab. 603. Pow. Mo. 242 143.

3 Day 397

1 Ver. 245 1 Ver. 87 Pow. 143

2 Ver. 177 Prec. Ch. 112 2 Atk. 160

his bond debt will be forfeited to the mortgagee & incumbrances, in the manner

2. Atk. 52.
3. Atk. 556. Doe v. Jones. 2. Atk. 84.
3. Atk. 84. 240
1. Bro. 37.

quite unencumbered, have an absolute equity than the bona creditor, more recent debt of his bond, for payment of his mortgage debt.

But in a the Stat 8 & 9 Wm. against

Prec. Ch. 71. 10 Eq. Ca. Ab. 329.

fraudulent devises, the same rule holds against the devisee of the equity of redemption, as the heir was entitled to in the last case.

On the other hand if the assignee of the

6 Ves. 361. Pow. Mo. 145.

mortgage, has a bond debt due from the mortgagor he has the same equity, (on a bill to redeem) against the mortgagor as the original incumbrancer would have had.

2. Ch. R. 247. Pow. Mo. 146.

And in the application of these rules it makes no difference whether the mortgage was made first, and the bond debt contracted after or vice versa.

Where the mortgagee or his representative is left in equity on a bill to redeem that it will convert he ought beyond the penalty, provided the second interest accrue the penalty

10 Eq. Ca. Ab. 611.
3. Atk. 515.
Talb. 154.
2. Bl. R. 432. 435.

in the bond, to recover which the mortgagee was prior. "He who claims equity, must do equity, & he cannot recover without it.

# Equity of Redemption.

But, it has never been done when the mortgage is of [illegible] equity, on a bill of foreclosure. [illegible] 154. 3 Bl. 432

In all the cases where the mortgagor applies to be relieved against his contract Equity to do justice, imposes such terms as in their discretion seem right.

The mortgagee, or his assignee, to whom money is due, otherwise than by the mortgage, may tack a [illegible] upon their [illegible] in [illegible] so that he may be redeemed, on payment of the mortgage money only. And in case of a debt that was in [illegible] was concealed, in like manner a subsequent incumbrance would be preferred to him. [illegible]

This doctrine is more fully explained hereafter.

Though the mortgagor, and his heirs, in the cases which have been considered must on redemption pay the debts not secured as well as that secured by mortgage, yet a purchaser of the equity of redemption for a valuable consideration may redeem on payment only of the mortgage debt; for his claim to the land is of a higher nature than [illegible] charges. He can [illegible] than [illegible] on the land.

1 Eq. [illegible]
Prec. [illegible]
511
[illegible] 110
[illegible] 87.

The mortgagee's claim then as to the debt not secured by mortgage, is only [illegible] against the mortgagor himself and his heirs.

Equity of Redemption.

[illegible] mortgagee [illegible] to redeem [illegible] the mortgagee [illegible] 2 Eq. Ca. Ab. 599 [illegible] however, for the mortgagee is not obliged to a bar to the right of redemption; the [illegible] are not within the statute of limitations or devises. The mortgagee and mortgagor, by the sufferance of the mortgagee [illegible] is not adverse to the right of the mortgagor. It is consistent with the mortgagor's right to redeem.

Id. Ibid. I.

Still however, the object does not [illegible] the statute that it considers a [illegible] possession, in the mortgagee after foreclosure, as prima facie a bar to the right of redemption. [illegible] presumption that the mortgagor has relinquished his right and is not per se a legal evidence in favor of the mortgagee.

Cowen & Hill's Supp. to Phillips' Evid. 1 Vol. 315 — 4 Mass. 297 — 3 Pick. 315

Cowen & Hill's Supp. to Phillips' Evid. 1 Vol. 315—4

[illegible] appears to be a reason for the rule, that the sufficiency of [illegible] of the account after a long possession of the right would be very perplexing.

[illegible] presumption [illegible] the presumption [illegible] by proving such facts as will account for the silence consistent with a subsistence of the [illegible] was no [illegible]

## Equity of redemption

The presumption may be rebutted by proof plainly of the circumstances which occasion it to arise in the first instance, as by proof that the parties have been in a state of equality.

It may also be rebutted by proof of a bargain that the certain advantages given by the mortgage have been recognized by the mortgagee, either the terms of the bargain show, as if he has accepted interest the mortgage debt, or has made up the account between the mortgagee and the mortgagor within the time.

In order, when there has been such an interposition of equality, as to prevent a redemption, the time allowed for the inability is considered, is said to be the same as that prescribed in the statute of limitations, Wyrdemann Lect. p. 5, in Cases.

When taken any former transaction, or the mortgagee, to prevent his redemption, no lapse of time will bar his right, unless it appears that the lapse of time will be a security for a fraud.

When it is apparent, that the mortgagee will take possession until the debt is paid, no lapse of possession will be a bar, unless it permits an accounting of back dues.

Scott 540.
2 Atk. 33.
1 Ven. 318.
2 Ch. 313.
1 Atk. 287.

1 Atk. 28 note.
Fow. Mi. 149.

1 Ch. 65
3 Atk.
Fow. Mi. 151.

1 Ven. 148.
Powell. 156.

# Equity of Redemption.

The rule is the same in the case of sub-mortgages. Such mortgages are here, in which the money is to be paid at a given time.

1 P. W. 291.
2 Ven. 701.
2 Ch. 363.

and the same day, in case the mortgagee may in such case recover and forever bar him.

5 Mun. Ch. 505.
2 Eq. Ca. Ab. 596.
1 Bro. P.C. 309.
5 Ch. 199

Any act of the mortgagee, which implies that assent from of the mortgagor, is sufficient to prevent a bar of the mortgagor's redemption within the limited time; such as a receipt of the mortgage debt if then made is a redemption, a bill brought for foreclosure or a contract with the mortgagee for the purchase of the equity of redemption.

"If a mortgagor redeems it for passion he not barred even, mere fact in case another time however not."

Cowth. 60
10th

A second mortgage of the same premises is considered as a mortgage of the third estate, and not of the equity of redemption. Else, the mortgagor never could redeem the first mortgage, which he also redeemed the second. And in such case too there could never be a third mortgage. The second merging of a redeemed, covers the whole equitable interest.

# Devise of lands mortgaged.

The interest of the mortgagee is held a chattel interest. But it is devisable as any other estate. It may be devised and the devisee is entitled to a decree to foreclose.

1 Ch. 237
Pow. 100.

The interest of the mortgagee is a vested interest, no words of limitation are necessary in a devise for the purpose of passing the whole of it. Words of inheritance or perpetuity are not necessary. The words "I devise to S. all my mortgages," will pass even a mortgage in fee.

2 Bin. 9.
Cr. 6 L. 197.
450
2 Ch. 197-
179.

The mortgagee devises his interest, the devisee may foreclose the mortgagor & his heirs without making the heir of the mortgagee a party: for he has no interest.

1 Eq. Ca. Ab.
318
Pow. 485.

It has not been judicially settled whether the mortgagee's interest will pass under a devise not attested according to the Stat. of Wills and Testaments. Concerning it will the chattel interest not being "real estate" or "lands and tenements" does not certainly come within the language of the law. Perhaps the interest of the mortgagee will not pass under the words "lands and tenements."

2 Vern. 621.
1 Vern. 9.
2 Ver. 351.
2 Ver. 978.
Cath. 35.
3 Ch. 79.
261.

## Of priority of incumbrances, and taking prior and latter securities.

If there are several mortgages, or incumbrances, on the same estate, priority takes place among the several incumbrances, according to the date of their respective deeds. The rule as to priority is the same with regard to incumbrances by judgments, statutes, &c. the maxim is "qui prior est in tempore, potior est in jure."

Cop. Eq. 26. 42
2 Ver. 81. 525
Cath. 58
2 Ver. 477

But this priority may, under some circumstances, be lost and then a prior incumbrancer be postponed, to a subsequent one. This happens, 1. when the prior incumbrancer has been guilty of some fraud or equitable affecting the interest of the other. 2. When the latter has purchased the legal estate to protect his lien.

Ver. 97
Ver. 756
3 P.W. 281.
T.K. 255
2 Ver. 575
Str. 243.

1. If a prior mortgagee, by fraud or artifice conceals his mortgage, to induce another to lend money, on the same security, the latter claims a priority in equity, to the former.

2 Atk. 49
Bonadio
Rob. F. 528
Rec. Ch. 95
1 Ver. 370

Thus, where a prior mortgagee was present at the time of making the second contract, and did not mention his mortgage, but postponed to the second. So, also, when the fund was written to a second mortgagee, and receiving the contents, acquiesced in the notice of his mortgage, the second was preferred to him. But if a man, that is, through

1 P.W. 393.
Ver. 6.
1 Ch. Ca. 37.

tion will not be that a witness
the contents of the deed he attested.

And if the first mortgagee is ignorant of any
incident in consequence of which, another
is encumbered the land on the same security
The first shall be postponed: As if he lends
The title-deeds in the hands of the mortgagor
who availing himself of it, delivers them
over to the second mortgagee. Then one of
two innocent persons must suffer by the
default of one of them, he who occasioned the
loss, must bear it.

Vin. 360.
1 Ven. 186.
2 Vern. 557.
2 P.W. 290.
1 P.R. 755.
782-3.

But this would not be the rule in Boston
nor in any of the States, in which the town
or County registers, and not the title deeds,
are the highest evidence of the granted title.
The title-deeds are not here considered more,
as the conveyance of lands.

And as by the mere negligence, or concealment
of the first mortgagee forfeit his interest. 2 Ven. 554.
by, a fortiori, he will lose it, by a direct
of his incumbrance, provided that the second
mortgagee at the time of applying for his
hypothecation, informed the first mortgagee that
he was about to be a mortgagee on the same se-
curity.

Q. The prior mortgagee may lose his prio-

## Of tacking prior and latter incumbrances.

If, when the second incumbrancer purchases the legal estate, for then, oh, when second equitable interest affect the same estate there is no priority in equity and when one obtains the legal estate he shall be preferred to the rest, this rule depends on the maxim that "when the equitable interest are the same the legal estate shall control."

1 Ch. Ca. 226
1 Vern. 197-8
2 Ver. 573
Pra. 248
2 Atk. 53
1 Round. 210

But if the third mortgagee at the time of lending his money on the security intermediate mortgage, knew of the intermediate mortgage, he cannot by purchasing the prior incumbrance, protect his own. But if he did not know of the intermediate mortgage, until he had loaned his money he will have a right to protect himself, by taking the legal estate.

A subsequent mortgagee may act in this manner, not only, by purchasing a prior mortgage, but by purchasing any interest which carries the legal estate: as by purchasing an outstanding term. viz, one which had been assigned to trustees for some special purpose, or a priority may be obtained by taking a feoffment which carries the legal estate, as a Matter.

Fonb. Eq. 214
Pow. M. 98

In all these cases, the subsequent incumbrancer, who purchases the legal estate holds in Rev. 224 till he is paid not only to the amount of the incumbrance purchased, but also the amount of his own debt, secured by the subsequent incumbrance.

The general rule of priority of incumbrances according to the date of the deeds, admits of an exception also, where one party has more right to call for the legal estate than the other. By this is meant, when one party has in equity, a right to the legal estate. As if there are three mortgagees, and the third has already entered into an executory contract, for the purchase of the first. For equity considers that which is contracted to be done, as done. 2 Ferg. 486. 2 Ven. 610. 2 Ch. Ca. 213.

And when a subsequent incumbrancer purchases in, a prior satisfied incumbrance, or a satisfied mortgage, is deemed, provided it be one which can be made use of, as a term, that will give him a priority. By a satisfied mortgage is meant, one in which has been paid up, or the forfeiture, which does not revest the estate. So if a judgment is satisfied and yet not discharged or vacated, it will be sufficient to give priority to a subsequent incumbrancer coming in equity with the first. 1 Ven. 287 2 Ven. 70. 79 Dixon. 118.

# of tacking prior and latter incumbrances.

Ch. Ab. 927.

2 Ven. 2 Equity Cases Abridged 85.

And this rule holds where the subsequent incumbrancer takes the legal title without notice.

Indeed the rule has been carried still further in Equity and it has been holden that the subsequent incumbrancer in obtaining a prior incumbrance can not avail himself of obtaining a priority to the intermediate incumbrance. But this is carrying the rule much further than I should have supposed Equity would have done.

1 Ven. 52-3.
2 Ven. 159.
Bunn. 295.

Where the prior incumbrance is equitable in equal equities, it will give no priority when purchased in by a subsequent incumbrancer: as a prior judgment not docketted, or a recognizance not enrolled. These do not carry the legal estate.

2 Ven.
2 34.
1 Ch. Ca. 340.
2 Eq. Ca. Ab. 594.
7 Vin. 54.

A subsequent mortgagee can take no advantage the legal title, to his own purpose, so as to protect it. If there are four mortgagees, the fourth purchaser in, the second and third, have no priority over the third, for the legal estate is in the first.

2 P. Wms. 773
1 Ch. 73

And a subsequent incumbrancer cannot take the legal estate, so as to protect himself against an intermediate incumbrancer. There is great difference

not obtain a priority over a former mortgage, by purchasing in a former incumbrance, for the judgment creditor has no specific lien on the bond, and therefore not an equal equity with the second mortgagee. 2 Ver. 582-591 2 Ver. 662 Prec. Ch. 179. 310. 1 Ch. Ca. 62 Ch. 325.

Third a prior mortgage purchased in, will give no priority unless it is perfected at the time of the suit commenced. For by gaining judgment, the legal title remains as at Com. Law. 2 Vern. 156.

As a subsequent mortgagee may protect himself by purchasing in a prior mortgage, so the first incumbrancer having the legal estate, may tack a subsequent one, advanced by him upon the former security, to his prior mortgage, &c. 2 Ferg. 66. 2 Atk. 794. 2 Ch. Ca. 353

But he must, or apprehend, have advanced the second sum, without notice.

So also if there are two mortgages, and the first of them, makes a subsequent loan to their grantor for his security, he may tack this to his mortgage. 3 Atk. 288 Prec. Ch. 276 3 Ch. Ca. 80 294

Whenever a subsequent mortgagee purchases in a prior incumbrance to protect his own, it is necessary, to give him a priority that he should have been ignorant of the intermediate mortgage, at the time of lending his money.

But to this general rule, there is an exception, where the prior incumbrance is equitable,

# Tacking incumbrances.

3 Rep. 844. Cro. Car. 294. 288.

The court decreed the subsequent incumbrances will have priority, tho' the last mortgagee for the legal estate was an innocent purchaser, paid value, and had no notice of the prior incumbrances, and to be a purchaser within the meaning of the statute of uses, which requires the legal estate should be conveyed, when in equity would be carried into effect.

2 Ch. R. 721. 2 Vern. 344. Eq. Ch. 449. 3 Bac. 643.

A reflection occurs with a view to be endeavored in equity against creditors who have only voluntary and not specific liens, tho' have not equal equity.

If the first mortgagee were, moreover, a trustee, making the subsequent mortgagee a security for future loans, such loans, when made, will be considered as part of the original contract, and will be preferred to an intermediate mortgagee, provided the first at the time of making the subsequent loans, had no notice of the intermediate mortgagee.

7 Ved. Prince. 12. Cro. Ch. 229. 256. 285.

A first mortgagee will obtain priority for subsequent loans, even if he had notice of the intermediate incumbrances, provided the intermediate mortgagee had notice of this share in the original mortgagee.

The doctrine of tacking in equity depends

in most cases, are the notice of the other incumbrances.

It becomes important then to ascertain what sort of notice is intended? Notice is of two sorts; actual notice, and presumptive.

One is said to have actual notice when he is party to a cause, or has had notice regularly served upon him. Pow. 250.

But a vague report, is not considered as notice. Thus if A being about to lend money on a funded security, is informed by a stranger, that B. has an incumbrance on the same fund, this notice need not be regarded. Goldb. 147.

Presumptive notice is a consequence of law that one has notice; though there is no proof of actual notice. In a line it is a general rule, that when one cannot make title but under another person, or other instrument, which encloses a certain fact, he is deemed to have notice of that fact. Pow. 319. 2. Pow. 662. 2. Sug. Ca. Ab. 615.

If A. mortgages lands to B, subject to legacies and B mortgages the same lands to C. C is deemed to have notice that the land is charged with the legacies. For he is deemed in common presumption, to know of, and mind the deed.

And if a second or a prior charge is delivered, money or the papers to an indorsee

2 Vern. 384. 2 Vern. 486 Prec. Ch. 266. [illegible] the first charge.

So also, a retainer in an action wholly or more [illegible] 2 Atk. 54. [illegible] a prior incumbrance, is deemed notice of that incumbrance, to the person who has been in possession of the record. As if, of three mortgages, the third, coming upon the record, is delivered into the hands of the fourth, he can not come forward and the second be to obtain the first.

Whatever facts are sufficient to put a purchaser with notice upon an equitable one, amount notice in equity. Thus where a mortgagee to a number of creditors, based their bond, and then after having recorded rent, the person in possession, an attorney for a creditor, was deemed to have had notice of the bond.

And I conceive from this case that possession by a prior mortgagee would be sufficient notice of his incumbrance to a subsequent one.

1 Ves. 69. 2 Vern. 477 — 485 2 Vern. 574. Notice to one's attorney, or counsel, will certainly be the prior equitable notice to himself. This rule holds where one and the same person is agent for both parties.

But whether one can succeed at this day upon [illegible] 1 Ves. Ch. 237. [illegible]

Notice of an equitable mortgage, by the mortgagee, [illegible] 65
[illegible] 2 Sim. 549.
[illegible] the mortgagor, [illegible]
[illegible] to be received from
[illegible] incumbrance.

A mortgagee who takes his mortgage after a
[illegible] 1 Ch. Ca. 75
incum[illegible] examined the mortgagor respecting other
[illegible] Nov 288
[illegible] by a third person, may be taken as obtaining
priority over the intermediate incumbrancer, for he is not presumed to have received notice.

I consider it, much of a question in Equity, whether a subsequent incumbrancer, can ever take,
or are to acquire priority, where the intermediate mortgagee, has properly registered. For I apprehend that our town registries, are considered as constructive notices, to third persons. Pairi
[illegible] 6 Ves. 147-
[illegible] 1 B.
cited, is the sole object for which they were designed. All mortgages are then required to be recorded, and if a priority can be obtained, by taking, an prior object of the law must be defeated. I should entertain no doubt on this
[illegible] 1 Eq. Ca. Ab. 65
[illegible] 2 Ves. 657.
question, but for the lapsed rule that a notice, in their registering Counties, is not constructive notice, to subsequent mortgagees.
Mr Jarnell to justify his decision, says that the second mortgagee on examining the registry might have given notice to the first and to bind any more money. But it would be strange to require this.

Notice of prior incumbrances.

and parallel on the same principle is opinion that a person mortgagee may gain priority over former registered ones by taking a subsequent mortgage registered, is however, doubtful, and in Eng.d is preferred to a prior one not registered, provided he had no notice of the former mortgage. But if he had notice of it he will not gain priority for he now, in the case supposed the same value which the register was entitled to gain.

Inf. 12 Ve. 66. 2 Atk. 207 3. Atk 645 Tr. 664.

And a purchaser for a valuable consideration will hold against a prior voluntary conveyance, though he had express notice: for the first, by Stat. 27 Eliz. is void, as against the second. Nor will he have been more in the 27 of Eliz. Scotland in Engl.d

Eq. Ca. Ab. 334. Cauf. 280. 711. 9 Cond. 57 6 Br. Ch. 48. 1. A. K. 332.

If a purchaser with notice of a former incumbrance and then sells to B. who has no notice, B. not affected by A's notice and will therefore be allowed to account himself, by taking for as the property to A. might have conveyed to B, so as to give him an equal equity with and notice so A. his assignee by conveying

[illegible] 147. 1 Atk. 571. 2 Br. Ch. 25. 3. Br. Ch. 25. Ca. L. 502.

[illegible] notice will remember the same equity [illegible] of one purchaser with notice [illegible] to a bona fide without notice the former is not affected in the notice which he himself had [illegible] he stands in the place of his assignor who [illegible] have had.

## To whom a forfeited mortgage belongs on mortgagee's decease.

The interest of the mortgagee being personal, accrues on his death to his personal representative.

Men will remember Lord Coventry, whether the money should be paid after forfeiture, to the ex^or or to the heir: but the rule is now well settled, in all cases, as I have given it.

D. Scott 158
16th Ga 283.
Wharton 467
Prec Ch. 294
304.
479.
Ry. in. 46.
326.
1 Ferm 172.

The application of this rule, may indeed be avoided, where the mortgagee has devised a right found in the heir, on the covenant, or otherwise.

A rule, now, proceeds on this principle, that as the loan or debt, accrues out of the mortgagee's personal fund, so the payment should accrue to that fund.

16th. Ga. 283.

Still, however, if the money is payable to the mortgagee his heirs, or exec^rs the mortgagee is still liberty, on the day of payment, to pay either the one, or the other. After the day, he barred this option.

When, upon a forfeiture mortgage, the money is paid to the ex^or, the heir of the mortgagee is bound to reconvey to the mortgagor. The legal title is nominally in the heir, after forfeiture tho' he has no beneficial interest. After payment he is a mere trustee for the mortgagor, or hardly entitled to the equity of redemption.

Barnard. R.
16th. Ga. 282.
Prec. Ch. 501.

If, upon the death of the mortgagee the title vests in infant heirs they may be compelled in case (infra) to release and on the use

Mar. 1807. compellable to release upon payment of principal, and be valid. For it is a general rule that a party cannot bind, ~~release~~ in an equity where he would have been compellable to act and valid.

May. 1813. For a late Ct. in Bosanq. the exr. or admr. may release in this Court, make a valid release.

2 Ves. & Bea. 302. If the mortgagee has been actually paid, the heir is compellable in Eq. to pay it over to the personal representatives; or the mortgagee may be compelled to pay it over again.

Though the mortgagee should die before foreclosure, in which case, the mortgagor may pay the money to the heir and he is compellable to pay it over to the exr. or admr. prompt.

3 Ch. Ca. 319. The mortgage money ought be applied according to the mortgagee in whatever hands it may be.

If the mortgage be in trust, the interest of the mortgage belongs to the cestui que trust and the heir.

2 Bro. 199. 367. 3 Eq. Ca. Ab. 595. in possession of the land, to receive the money to convey, it to the admr.

And the rule holds even though there are no debts owing from the estate of the mortgagor. For as against the heir the personal representative is entitled to it to enable a distribution.

And even though the mortgagee release the equity,

To whom a forfeited mortgage belongs

to the heir shall the personal representative be entitled to the estate i.e. the encumbrance. 1 Sum. 4. 170. 2 Ed. 193.

And the rule is the same if the mortgage has been foreclosed unless the mortgagee had taken actual possession.

There only seem, when the owner after encumbrance on his death, does not manifest a different intention. And if he intended to hold the estate as real estate, it will on his death be so taken. Thus if a person under the mortgage is assessed the owner on his death, with so on the estate is treated the purchased money goes to the heir.

Illustrations of the principle of an equitable mortgage in which it takes the form of an absolute purchase, is to have an equitable property.

If a mortgagee devises his interest in real estate to the heir and not to the devisee will on his death, be entitled to it. But in certain of the mortgage was that the estate should go to the devisee as real estate. Bro. 54. 265. 28 Sum. 551. 5 Bro. 100.

In such a case, however, it is a question of intention. The mortgagee owning the money from expiring and is a legacy. Since the devise is absolute to heir.

If money secured upon a mortgage is bequeathed to be laid out in land the money due on the right of the mortgagee, is bound as real

## To whom a forfeited mortgage belongs.

[illegible]

[illegible]

[illegible]

[illegible]

[illegible]

[illegible]

## Wife's interest in her husbands mortgaged estate.

[illegible]

[illegible]

[illegible]

[illegible]

[illegible]

[illegible]

[illegible] 2 Bac. Ab.

[illegible] 1 Sw. R. 543.

[illegible] Rev. M. 314.

[illegible]

[illegible] 2 Sw. 118.

[illegible] Rev. 315.

[illegible]

[illegible] Rev. 208.

[illegible] 71.

[illegible] 2 Ath. 54.

[illegible] 1 Bro. C. 148.

[illegible] 2 Sw. 382.

[illegible] 4 Ch. 484.

[illegible]

[illegible] 2 Vern. 100.

[illegible]

[illegible]

Wife's interest in her husband's mortgaged estate.

If the husband repays a debt of her [illegible] taken as one done in the exercise of [illegible] and she is entitled to it in [illegible]

2 Vern. 673.
2 P. Wms. 364. [illegible] if [illegible] to pay the debt without it, [illegible] was [illegible].

It is now settled, in Eng., that the mortgagee is not entitled to claim in the equity of redemption of a mortgage in fee. It is now

2 Ch. R. 232 [illegible]
2 P.W. 123.
5 Ves. 504.
1 Ch. R. 606.
3 Ch. R. 224.
Pach. 180.
2 [illegible] 5 [illegible]
[illegible] 138.
[illegible] 520.
[illegible] 7 [illegible]
[illegible]

settled as a general rule in which the claimant may be aware. The rule seems to be understood in principle as the general law, though it is still suffered to remain.

In this case, however, considering the [illegible] the [illegible] before marriage; for a mortgage in husband's name upon marriage will not affect the right of dower.

12 Co. 94.

If, then, however a mortgage made by the husband [illegible], [illegible] well lost in [illegible] to the wife's right of dower. If he [illegible] the wife is entitled to dower, only in the estate [illegible] husband, at the time of his death. But [illegible] the hand, it is well settled that the wife of the mortgagor is entitled to dower in his equity of redemption.

Co. Lit. 32.
2 Vern. 673.

Lord in Ex., as well as in Chancery, is [illegible] entitled to dower, in the same way as a mortgagee [illegible] of a mortgage [illegible].

Wife's interest in her husband's mortgaged estate.

[illegible]

## Mortgages by husband and wife of the wife's freehold.

If husband, by mortgage, alienates or otherwise disposes of his wife's freehold, then a husband and wife joining, bar and mortgage their right of the wife's inheritance.

It follows that he cannot mortgage it for his own debt, or for his own life, but for their joint lives, or for his own life, than for his own life. But the wife's interest, even though the wife should not be the mortgagee, enough to give it to the creditors.

In order to bar the husband and wife must mortgage or convey the fee, by deed of bargain and sale, the husband alone cannot convey her right. Her right cannot be barred in Equity, but must be barred at law, by fine or recovery.

As to the question which lands of the wife after coverture descended will convey, I refer to [illegible] and [illegible] Bacon's Abridgement.

Bacon's Abr. 2. B. 2. 2. Prop. 2.

Mortgages by husband and wife of wife's freehold.

If the wife's house is mortgaged, to secure the husband's debt, her personal estate is to be applied to the discharge of the debt, and, on his death, she may claim the aid of his personal hand for this purpose, to the exclusion of heirs, and even legatees.

1 P. W. 264
2 Vern. 604, 689

Another lawyer lended a fine, to incumber her freehold, does not convert her of the character of a creditor in equity. She joining to incumber his estate, in incumbering her own, shall stand, on his death, in the place of the original mortgagee, as far as respects his heirs. For the incumbrance of her estate, amounts to a purchase of the mortgage.

2 Atk. 384

If a feme sole, being a mortgagee, marries, the husband is entitled to the mortgage, as well as to her chose in action, provided he reduces them to possession, during coverture, or his collateral the money, &c. &c.

Pre. Ch. 412
3 Vern. 501
1 Eq. Ca. Ab. 68.
1 P. W. 458

But an assignment by the husband, of the wife's mortgage, is not a reduction into possession, unless it was a bond for a valuable consideration. The command survives her, of the right by a mere creditor.

Pre. Ch. 4
2 Vern. 170, 401.

If the husband's creditors obtain possession of the wife's mortgage, a right of equity in her interest in her favor when she is compelled to resort to him. Thus, it has been held that the assignee of a bankrupt husband cannot obtain the pos-

1 P. W. 197

mortgagees of the wife's freehold.
Even may hold it. For even with notice, if
the creditors of the husband would have taken
it in execution. Cf. 1 Eq. Ca. Ab. 319 would the equity
be equal between the creditors and the wife
and the creditors have the legal title.

If, and the time of the husband becoming bank.
rupt, the wife's conformation of the mortgage
the Court of Equity will not in future in favour
the creditors. Burnett v. Jones supports a gen.
ral in the hard case, whether Eq. Ly would not
in future provided the creditors would make
a suitable provision for the wife. I think they
would not.

But a Court of Equity will in future account
the wife, in lieu of a separate provision, the
husband is in such consideration. The wife
in such case would be compelled to resign the
mortgage money. So this the creditors lost
for security, and in fact the advantage
bankruptcy, to the husband personal security.

Per Equitem, by the husband, to assign
the mortgage of the wife, on receipt, for a debt
which he owes will hold her in Equity
for benefit, i.e. to the amount of his debt. This
is really a mortgage upon a mortgage when
the wife may recover.

1 Ch. Ca. 72
Ch. Ca. 309
P. W. 316.
Bro. Ch. Ca. 561
Ch. Ca. 27
P. W. 297
P. W. 316

## Out of what funds mortgages are to be redeemed.

The general rule of equity is that the land which has been incumbered by contracting the debt, shall be first applied to the discharge of it. Hence, as the mortgagee's debt is personal property is first taken, and the executor is compellable to answer the accumulation for the benefit of the heir. If the personal fund has been insufficient, the mortgage was paid.

Coll. 449. Eq. Ca. Ab. 269. Coll. 54. 3 P. W. 358. Prec. Ch. 61.

This rule prescribes that the mortgagee has not encumbered the inheritance with any incumbrance, but only conveyed that property to secure.

In this case, where the personal fund is liable, the heir is entitled on the bond by the creditor, though he may force the exec.r to pay it.

The rule holds as to the same as a purchaser of an equity who is in the place of the heir — he is the proper party, and is in the same manner entitled to call upon the personal fund.

Prec. Ch. 477. 1 Atk. 487.

The rule is here even though the mortgagor has bequeathed away his whole personal property, among his creditors. For the personal fund is first taken for debts, notwithstanding legacies. Apprehended however, from the case that the rule applies only to mortgagees — and not to pledgees or [illegible]

Prec. Ch. 477. Coll. 54. 2 Vern. 701.

funds, from which mortgages are to be redeemed.

This rule obtains, not in those cases in which the mortgagor, has been considered as owner a [illegible] 5.

mortgagee, [illegible] and against [illegible].

Though the testator expressly charges the real estate, with the legacy devised, yet their remedy is barred, (as between the real and personal representatives) only in a court of personal assets. Whether charge upon the realty, [illegible] that in the [illegible]

Still, if the intention of the testator is ascertained, that the real estate shall be charged in the first instance, as if he owe it "to the [illegible] for payment of debts," it will be first charged. But if it had been merely a devise of real estate, [illegible] it would have been otherwise.

[illegible] 5. [illegible] 2 Ch. 718. Rob. 38. [illegible] 97.

The rule that the personal fund is first liable, and to be applied to exonerate the real estate, is not to apply in favor of the heir, to the prejudice of simple contract creditors, or legatees. (it generally does) [illegible] Rob. 61. 61. 67. Tell 54. 2 Ch. 79. Rob. 385.

[illegible], however, does hold [illegible] against the exec., and resid. [illegible].

If the mortgagor leaves both simple contract and specialty creditors, then it seems [illegible] 1 P. Wms. 692. 2 Ch. Ca. 45.

specialty creditors, the personal fund [illegible] will exclude the simple contract creditors.

funds for the redemption of mortgages:
a 2. 53. cause [illegible] real fund, pro tanto.

And the same rule is in favor of personal liability, tho not in favor of residuary.

2 P. Wms. 7 The distinction with regard to encumbering assets are treated of under the title Bri & Adm.

The heir of the mortgagor is not entitled to the aid of the personal fund, as against a specific legatee. Upon the mortgagor bequeaths a watch to A, & a horse to B, and leaves personal property, suffic. to pay his debts. These specific legacies cannot be taken by the heir to encumber his real estate.

14 Ves. 693

A specific legacy is one which is directly contained, and exactly defined, so as to exclude all distinction in fact or attention, which of the same kind, as money in a particular bag, a horse, watch, &c.

P. W. 304. 2 Vern. 422

Tho' the mortgagee devises his estate "with the encumbrances thereon" yet, if there are no words evincing that the devisee shall take the estate free from encumbrance, he must take it subject to the aid of the personal fund.

But the after land, if there is a clear provision in Britain, the devisee shall take the estate free from encumbrance, even the real estate is the hands of the heir, as much as the personal fund shall be applied to encumbrances.

P. W. 326 Bro. Ch. 3 Ves. 26 2 Atk.

Out of what funds mortgages are to be redeemed.

2d. The mortgagee assigns his interest the heir of the assignee in the latter's case the law no claim on his personal fund, the answer under the mortgagee's intestate — for the assignee of the mortgagee has received his personal fund, but surrendered it by taking the assignment.

Rob. Eq. 454.
Rob. M. 412.

An common rule laches as to the security of the assignee.

If the money due on a mortgage, is not bequeathed the debt & the owner of the equity of the estate mortgaged at death and not the personal fund of the owner shall be applicable to redeem it. His personal fund is not supposed to have been appointed by the mortgage.

P. W. 267
Rob. Eq. 454.

As a rule as the death of the mortgagee his heir inherited his real estate, as additional security and their security his land, and which the debtors common claim will given the personal funds of the heir.

## Of the payment of interest of money lent on mortgage.

The rate of interest which [illegible] is 5 per ct. in Tenn. 6, and in Mississippi 10.

Rob. Eq. 551
Pow. Mort.

If a deed or bond provides that if a mortgage is overdue for 5 per ct. and the mortgagee receives the mortgage is paid.

## Payment of interest of money lent on mortgage.

This rule is not law. It is the reservation, and not the receiving of usury, that is the offence, which makes it the contract. The rule cannot be law, unless qualified by a supposed secret agreement, at the time of making the mortgage; [illegible] opinion, contrary to Lord Kenyon's law bound it down.

1 Atk. 7

4 Bro. 2203
Doug. 223
2 Ch. R. 241
3 Ch. R. 539
1 Ch. R. 184

It has also been holden by Lord K. that a contract made in Eng. for a mortgage of lands in the W. I., is void, if more than the legal interest is allowed, though it does not exceed the legal rate in the W. Indies. This rule seems to be, unless the money was borrowed in Eng.

3 Atk. 727
Hom.

The rate of interest, [illegible] must be a general rule, be usurious or not, according to the rate at the place where it is payable. Therefore, in cases on the exchange, bills of exchange drawn in Eng. payable in Holland, or in any other foreign country, [illegible]

There is an established distinction in Eq. of [illegible] between a mortgage, reserving a penal interest, with a clause of redemption, if the money is not paid at a certain time; and a conditional reservation of a [illegible] with a clause of [illegible] if the debt is punctually paid. The former, being in

Fonb. in. 100
1 Ch. R. 526
2 Ven. 349
2 Atk. 452

[illegible] the contract of [illegible] is enforced in equity, but the [illegible] will be regarded. This doctrine of the civilians, on which it is grounded, [illegible] for the [illegible] Ros. 1.

A covenant to pay the additional one percent, it is well settled, is binding.

And a condition, covenant, or additional percent, tho' in the form of a penalty, will be enforced, if on consideration of the [illegible] by way of forbearance, is granted to the mortgagor. Fr. 65. 2. Ma. & Cr. 65.

Interest upon interest is regularly not allowed. It is a rule both in law and equity, even when there is an express contract for it, lest it tend to the oppression of the debtor. Prec. Ch. 150. 2. Ch. R. 81. 2. Ra. 602.

But if the mortgagee advance his interest to a stranger with the concurrence of the mortgagor, all the money paid by the mortgagee under it, was due to the mortgagee, principal, and will bear interest. The reason is that it is advanced with the concurrence of the mortgagor, amounts to an agreement that the interest shall be on the [illegible] of the mortgagee. [illegible] Farm. 169. 2. Ch. 85. [illegible] 301.

## Payment of interest on mortgage.

3 Ch. 241. It is usual to insert a covenant in the deed
1 Ves. 165. for payment of principal, with the consent of the
Eq. M. 427. mortgagor.

It was once believed that on a perpetuity mortgage,
2 Ves. 15 the mortgagee should have compound interest
Ch. 118 but the rule is now explained
2 Ch. 331
1 P.W. 652.

But the refusal of a master in Chancery on a mere between the mortgagor and mortgagee
makes that interest principal from the time
3 W. 470 of the acceptance of the report. For that is equi-
458 valent in effect to a judgment debt, in which
376. case interest is always allowed, whether the
Prec. Ch. 100 principal sued on which the judgment was given
i. Atk. 120. carries interest or not.

But the report of a master on a bill to foreclose an infant, does not positively carry compound
2 Ves. 342 interest, for an account of allowance of it is usual
2d. Ver. 25 case in the original decree of the court. But
12 Ves. 113. it is not unreasonable to an infant.
2 Br. C. C. 656.

But if an infant is held in bail on a bill to account the interest found by the master will become principal, and the court will compound
4 Br. P.C. 427. interest. For the right in this is allowed to the half hereditas of the mortgagee in which he is bound by the bail.

If an infant entitled to an equitable reversion
proceed to law without an interest and in the

Interest of money lent on mortgage.

cures a benefit to himself the account should be enforced, as where the mortgagee suffered the mortgagor to remain in possession, which was his only means of subsistence, an account of such an account ought for the infant's benefit, to have such account enforced.

But the mortgagee is merely opposing an account which states compound interest and obliges him to pay it. For compound interest account with rests is usury.

The account then, and the time of the mortgage, to turn interest into principal is not a guidings rule to be taken from the rules which have been found clearly. But if the interest has become due, an account to turn it into principal would be enforced.

I have before observed that interest for life in expectancy or remainder bonds, is compensable by the remainderman, to keep clear the interest. But a tenant in tail is not compellable, by the remainderman, to account.

Jones 88
3 Ch. R. 285

in an action in tail to sell the land, the mortgagee in fee has a right to make the entail and cut him out. Then he shall account with tenant in tail in order to divide the money [illegible]

[illegible]

## Interest of money lent on mortgage

The guardian of an infant

however if lent in lieu of mortgaged

2 Ch. 582 land is no tenancy he can be compelled

2 Ch. 42. to pay interest, for an infant cannot

1 Ves. 427. bind himself out of the house.

But if a tenant in tail suffers his commission

Ves. 4 against the remainderman will bind the land.

1 Bro. P. C. 210. But if it will not be complied on a

mencing to reimburse the interest then paid.

If in a will mortgage be taken for

money, unless the mortgagee be remainder in

fee and entitled to the power interest

in lieu of a subsequent mortgage the

money shall be applied to the first mortgage.

Bro. Ch. 51. 1 Vern. 270. 3. Bac. 658. no interest thereon is to be not have

received any. This is reasonable, for he could

not have of in his power the assigning

his interest to run in arrears, to raise the

subsequent mortgagee.

When a bonus is given to the mortgagee, the

2 Ch. 158. 1 Vern. 150. Rose Ch. 209. 1 Eq. Ca. Ab. 145. latter of it being merely personal, has a

right to satisfy the interest debt, hence a land-

interest. For he has a right to compel the bond,

i.e. payment to the bottom is a which entitles him to the whole. But the lender good as a point the mortgage. the mortgagee cannot be the attorney to satisfy

the interest.

At the conclusion, the mortgagee reduces

reciprocal the money due, after deducting; and the

Interest of money due on mortgage.

It was, the case has in fact been the same as the tender, provided the mortgagee has given notice (Eq. Ca. Ab. 7. Ch. 10.) notice to the mortgagee that he intends to make payment and the hereafter time. The reason either notice is to be given is that the mode of payment depends upon facts. There is no copy affirmed. It consequently is equally that he have notice of it.

The rule resulting from 6 & 7 Geo. 4 c. 42 s. 2, however, that the mortgagee shall make a tender, that the money has been received made for the mortgagee, provided the tender, and that he made no profit of it. For if he has made use of the money he is considered a depositary trustee. (Ch. 178. 2 Ch. Ca. 206. 2 Ch. 372. 378. 3 Atk. 33. 2 Eq. Ca. Ab. 595.) And the tender must have been a valid tender.

There has been some litigation both in law and equity, lately, as to a tender of a bank bill, it was valid. The rule is that if, upon the (Eq. Ca. Ab. 318. 1 Ch. 39. 1 Ch. 105. 3. 1 Ch. 557. 2 Atk. 320. 2 Bro. 170.) notice, that such a tender is good, where the [illegible] to the tender, because it is an [illegible].

The money must be a mortgage in money, [illegible] to the tender at the place of the mortgagee (Eq. Ca. Ab. 320.) [illegible] place is [illegible] place where the land is situate?

[illegible] place and place [illegible] tender [illegible] made a [illegible].

C.

Interest of money lent on mortgage.

First if an [illegible] interest is [illegible] on the con-
3 Ch. R. 387 dition and the mortgagee [illegible] other where
he dwells now known and that place is found
provided the place appointed is a reasonable
one and no obstacle in law and the time.

And to prevent evasion, it has been determined that a tender and the mortgagee's being
16 Ch. Co. 29 in his absence, is good in Equity where it can
Rom. M. 457 be proved that the mortgagee has wilfully
hedged himself out of the way to elude a tender.

On the other hand if the mortgagee has
3. Atk. 70 absolutely on to every legal account upon the satis-
2 Eq. Ca. Ab. faction of the transaction, on tender the interest
605. shall not stop till he has an opportunity to
consult counsel.

So also, if there is a question as to whom the
Id. Equity of Redemption belongs the mortgagee
before he executes a reconveyance may
require time to consult counsel.

It is said in the book, that the interest reserved, upon a mortgage, may be altered by a
parol agreement afterward. Here, I conceive, whether
if he would avail himself of the parol agreement
6. Mr. Ab. 880. it ought in the action, he could make
Rom. M. 460-462. use of it. for unquestionably the subject an agreement
by parol agreement may always be admitted.
But in other cases the rule is different.

# Method of accounting:

A mortgagee may [illegible] and not [illegible] the mortgagor is not entitled to the rents and profits, but he has possession. 3 Atk. 244 2 Ch. 107 Dup. v. Co.

The mortgagee when he accounts in possession is to allow interest on the debt and is not to account for the rents and profits.

But the mortgagee must account for the rents and profits which he has received during his possession in the order of time in which they are applied in discharge of the debt. 1 Ven. 476 in 8 Atk. 234

A mortgagee in possession is not regularly allowed any thing for his care and trouble in managing the estate. Though the amount of his labor is to be considered in the account of the profits.

But the rent is to come upon him [illegible] 2 Ch. Ca. 91 [illegible] 5 Ves. 8

[illegible] Stephens, he shall be allowed for that.

If the mortgagee in possession pulls down and [illegible] the mortgagor [illegible] 1 Ch. Ca. 34 [illegible] 2 Ch. Ca. 24 [illegible] 3 Ves. 604

[illegible]

Bern. 45 476. Eq. Ca. Ab. 328. The mortgagee is accountable to the mortgagor, as to the actual profits received, unless it appears that he might have made more but for fraud or wilful neglect.

But if the mortgagee takes possession, and through the receiver, or otherwise, receives more than the interest, or the profits would satisfy

Bern. 270 Prec. Ch. 70 principal money, during his possession, and so in arrear, it receives the mortgagor to redeem, upon his possession. This possession of the mortgagee is called renewed in Equity.

Eq. Ca. Ab. 329. In this case, however, the mortgagee is not accountable to the other mortgagees, for

Ca. M. 489 money received before the time of his possession. But in favor of the mortgagor, a strict account will be charged against

Bern. 29 J. Mac. 258. the mortgagee, if it appears that by wilful neglect, he has received more than was his proper share.

If after an assignment of the mortgage, the mortgagor brings a bill for redemption

Ca. Ca. Ab. 500 the mortgagee must still be made a party to

Pan. 471 the bill, that he may have an opportunity to account. If Mortgagee receives the money, the mortgagor, to whom he has paid the money

An account will be taken between the parties, and the mortgagee will be considered as

Method of accounting [illegible] the mortgage[illegible] [illegible] the other incumbran[illegible]

1 Ch. Ca. 299
1 Eq. [illegible] 12.
3. [illegible] 659.
2. Ch. Ca. 32.

[illegible] the [illegible], [illegible] [illegible] the [illegible] [illegible] [illegible] [illegible] the [illegible] [illegible] the [illegible] [illegible] the [illegible] [illegible] of the account.

[illegible] 472.
[illegible] 32. 38.

[illegible] the [illegible] [illegible] [illegible] [illegible] the [illegible] [illegible] the [illegible] [illegible] the [illegible] [illegible] [illegible] [illegible]

[illegible] 3/2.

[illegible] the account. [illegible] the [illegible] [illegible] the [illegible] [illegible] the [illegible] [illegible] [illegible] the [illegible]

[illegible]

[illegible]

# Foreclosure.

As the bond will arise on the death of the mortgagor, there is no remedy in favor of the mortgagee, so far as the action in favor of the mortgagee has ended in a foreclosure. The mortgagee may recover the mortgaged premises, if they should refuse, upon tender of the equity which is due.

Bro. Ch. 96.

The foreclosure is effected by decree that unless the mortgagor and his heirs or assigns within a limited time do redeem the premises, he shall be forever barred of his right to redeem.

Bro. Ch. 568

The redemption is made to depend on a bill to foreclose, when all the mortgagees cannot be found or are dead. But if they always settle the whole case, as none, at all. The decree is the rule as to payment.

Mutk. 565 Com. 280 Fin. R. 51. Sw. 197. 476.

A Mortgagee may recover a term of the heir of inheritance, for the equity of redemption descends to the heir, but personal property and equity go to the executor.

In a bill to foreclose the title of the mortgagee cannot be questioned. This is not true. Any stranger may also claim a foreclosure against the mortgagee.

Bro. Ch. 476. 2. Ca. 206. 214.

The meaning of the rule is this, that on a bill to foreclose, they will not avoid the legal title of the mortgagee but will have him to his remedy at law.

A mortgagee may pursue all the remedies at the same time, three distinct remedies, against the mortgagor. 1st by a suit on the note or bond. 2d by bringing a joint suit to recover possession. 3d by a bill to foreclose. The two first imply the principle of law, that one should not be liable to more than one suit for the same cause. For all these proceedings are drawn from each other and instituted for different purposes.

But in Equity where the equity of redemption is a vital equity, and liable to be taken in execution, the mortgagee may be compelled, in order to secure his equity, to bring an action at law, and then attach in equity for execution, instead of a bill for the foreclosure.

A bill of Equity may be resorted to for many reasons, where the courts of law are unable to do justice in all cases. This is a remedy of equity, a substitute for a common law action, which is found to be varied and adapted to circumstances with notice; but Equity will never decree a foreclosure.

# Foreclosure.

If the bill is a bill to redeem, on a reference to the
2 Ath. 107. master in Ch. to see what is due, does not redeem the
mortgagee, the Ct will on application dismiss the bill as against
* in the 29 mile 1667 mil. the bill by of-
fice.
him, which amounts to foreclosure.

16 Ch. Ca. 81 Neither could a bill be filed against the
2 Ch. Ca. 29 mortgagee for foreclosure, but the eq. of mortgage is a made party.
Rep. 479.

But on the other hand the mortgagee is a con-
3 Ch. R. 377. tingent necessary party on a bill to fore-
Rep. 483. close a equitable mortgage.

But if the heir of the mortgagee should obtain
1 Vern. 407. a decree of foreclosure he may hold the land
provided he will pay the amount to the ex-
ecutor of the mortgagee.

If he does not pay the money to the executor
2 Vern. 307 the latter may compel him in Equity to ex-
193. 328 ercise his power of selling the estate.
3 Ch. R. 67. 328.

In a decree to foreclose within a month this,
2 P. W. 505 the time is computed in calendar and not
in lunar months. This is varied from the com-
mon law rule.

Decree to foreclose a trust in fee after
equity of redemption, will bar the effect in
16 Ch. Ca. 217 tail, and those in remainder, though they
were not parties. The effect in tail was barred
on the ground that the whole estate tail is vested
in him. And the remainder was subsequent in
the leave to the issue in tail.

# Foreclosure

But if there is tenant for life, remainder-
man, the latter is not barred by a foreclosure
of the former, unless he is also made a party. 2 Ch. R. 101. Rev. 482.
The remainder-man claims by purchase and not
through the tenant for life.

If there are several incumbrances, some of
whom are made parties to a bill to foreclose, and
who are then under parties may be foreclosed, but
those who are not parties are not barred by the
decree. 2 Vern. 578. 6 Ch. R. 185.

When the mortgagee interest is assigned, and
the assignee commences a bill to foreclose
without making the heir of the mortgagor a
party, he bar no right. 1 Eq. Ca. Ab. 314. 2 Ch. R. 33. 1 Ch. R. 185.

A foreclosure may be obtained against an
infant, entitled to the equity of redemption,
but in such case a day is given to
show cause against the decree after he comes of
full age. He is allowed six months after
full age to plead this purpose. 2 Ch. Ca. 8 Ver. 592. 3 Ch. 40. 177. 1 Ver. 298. Prec. Ch. 185. 2 Ency. 95.

The way is expressly reserved to the infant
and he may be heard against the decree
of foreclosure. 3 Dec. 148

Subsequent this explicit reservation is not
usually made in the decree, it is sufficient to
[illegible]

[illegible]

# Foreclosure.

2 Ch. R. 552 But when he does [illegible] to any [illegible]
1 Ch. R. 344.
2 Ch. R. 401. [illegible] a [illegible] bechance
3 Ch. R. 321. [illegible] had been done made

But it would not be consistent that an [illegible] should [illegible] in the [illegible] as a matter of course. Indeed as a matter of [illegible], he cannot go into the account again, or be allowed to receive any payment of the debt and [illegible] the [illegible] he ought to have it to have been unjustly that

3 Ch. R. 352. is, he may take an account of any reasonable
Ch. R. 487. 490. which existed at the time of the decree, and which, if they had been urged, ought to have caused the decree.

But if a person be [illegible], [illegible] period, and the equity of redemption [illegible] in his [illegible] condition, a decree of foreclosure against other is [illegible]. No [illegible] is allowed him on account of his [illegible]. For, [illegible]

3 Ch. R. 352
Ch. 305 [illegible] will also the [illegible] no [illegible] in [illegible]
3 Ch. R. [illegible] [illegible] [illegible] [illegible] [illegible] [illegible] husband.

But tho' no [illegible] is allowed [illegible] yet the
1 Ch. R. 450.
3 Ch. R. 329 may [illegible] the decree for just cause.

If a mortgagee is [illegible] of any [illegible] [illegible] he is [illegible] a foreclosure the [illegible] will [illegible] the [illegible] [illegible] [illegible] will [illegible] the [illegible].

Where a mortgagee obtained a decree for foreclosure, pending the mortgagor's having a suit by the creditors, to be allowed to redeem, it was agreed in this case. 2 Atk. 38. 2 Eq. Ca. Ab. 604. 2 Br. P.C. 344.

So also in the mortgagee obtained a foreclosure after the independent bankruptcy of the mortgagor, had the effect of his opening the decree was opened in this case. 2 Eq. Ca. Ab. 170.

When a foreclosure is obtained in favor of a mortgagee in encumbrances, the party foreclosing is entitled to all his expences in obtaining it. Nevertheless it was agreed a mortgagee should not be unfairness. In such case, I think the expences ought not be allowed. 2 Vern. 185.

The time limited for payment, on a decree to foreclose, may in certain cases be enlarged. And it has been enlarged, when no other reason existed, than that the value of the estate was much greater than the debt. This is agreed in case of foreclosure had by decree of mortgage have been opened even at the time, in such case. 2 Eq. Ca. Ab. 605.

Foreclosure has been opened in order to account of a redemption, which was made to the sale of the lands. Inevitable accident which prevented the mortgagor paying the money at the day appointed, ought to be a sufficient ground for opening a foreclosure. Kent. 174.

Foreclosure.

But a foreclosure is never opened up from a mere calculation, founded on the equity of redemption in right. For the mortgagee has equitable equity, it is not the legal estate.

1 Eq. Ca. Ab. 317. 1 Ch. Ca. 217. For fear of an [illegible] reason the old [illegible] to a [illegible] from the [illegible] time. But it [illegible] and the [illegible] facts [illegible] to be [illegible] a [illegible].

2 Vern 701. 1 Eq. Ca. Ab. 317. Rose v. 420. But further no foreclosure.

2 Ch. Ca. 275. 1 Vern. 148. 2 Ver. 285. Cases of the first mortgagee, having obtained a decree of foreclosure against the second creditor, [illegible] to the mortgagee the decree of foreclosure is [illegible] facto, opened.

But if a mortgagee, after a decree of foreclosure, [illegible] the counter security, as on his bond, or note, the commencement of this action is a waiver of the decree, and revives the equity.

It was indeed once determined in Conn. that a foreclosure, with foreclosure by the mortgagee, was to be taken as a satisfaction of the debt; this rule is unreasonable, and is now [illegible] and [illegible].

1 Ract 20.

A foreclosure is never opened when the mortgagee has acquired [illegible] number of years in the mortgaged possession, under the foreclosure.

2 Eq. Ca. Ab. 177. 1 Ch. Ca. 299. 1 Ch. Ca. 3. 3 Ch. Ca. 315.

According to the English practice if the mortgagee is entitled and the time limited in the order Ram. 1st 479. 5 Ve.
"Nisi" makes it absolute, he a further order. This however is not an practice. An interval occurs in the alternative and an non-payment becomes absolute, without further order. In Ind. the "Nisi" is always given there and only upon during the interim terms. Would this not be very inconvenient in the actual practice.

The modes of acquiring property are two, in purchase and in descent.

When a person seised in fee, dies without a will, the estate vests by descent, in the heir.

If the ancestor died seised of a fee tail, it makes no difference, whether he died in possession, or not; for the ancestor has no power to alienate such a fee tail.

The word purchase is not used, in the limited sense, in which it is taken in common language. It means any other mode of acquiring an estate except by descent. A descent is called in law a purchase.

The northern nations, when they conquered the southern parts of Europe, introduced a question, peculiar to themselves, and unknown in their own in military tenures, which cannot be understood, but by reference to the laws of nations from which they were taken. The most step which was taken in their advance towards refinement was to grant estates for a term of years, afterwards estates for life were created and, and in process of time, by the introduction of the word "heirs," successive estates were created. But still, the tenant could not alienate or devise, nor was obliged to suffer the estate to be transmitted to his heirs, to him who was designated as the heir

Modes of acquiring an Estate

the principle, as it is said, which must always be at the origin of the first possession, this maxim is still in force.

In a little time, however, it will be perceived that collateral heirs would be held in. By a certain law in default of the issue of the first purchaser to succeed, the estate from revesting back to the heirs, it is evident to have been first acquired by some ancestor who was the prescriptive of the collaterals of the last tenant. This was a very thing to the income and to prevent the collateral relations from taking the entail estates to the tenant and the heirs of his body. And on default of these, the estate must revert.

Before a great while estates had become mortgageable as well as disposeable, marriage settlements in perpetuity which were taken to provide for a family of the intent and not to limit the course of descent. Substituted, however, are not thus alienable. For to remove the fetters from the, the courts held them to be estates in remainder upon condition, that the ancestor have given an estate in some alienable, an absolute estate or fee simple.

This construction became one to the secretaries of all sorts which it was the object to be no.

bility, would recover him [illegible] make the estate descendible and transmissible to posterity. The execution of the statute was afterwards however prevented on the construction of common recoveries, which in it was decided would work an entailment.

The statute 27 Hen. 8th made all estates in fee simple except those held in joint tenancy, descendible. This statute requires an actual seisin of the reversion. The statute requires only an advancement without actual seisin. Used in regard of the statute, a joint tenancy is descendible by survivorship, and they have in tenancy the same, to the survivor of estates for the life of another.

Personal property was always devised away in England and it seems impossible that they should have lived long without the power of devising their real estates. Before the statute however a method of accomplishing the object was invented, by granting the legal estate to the use of the grantor, and then devising the use; and Ch. of Eq. always compelled the execution of the trust. This practice became very important during the controversy between the houses of York and Lancaster, for the use of land was not forfeitable. The Stat. 27 Hen. 8th

however, put an end to this by executing the conveyance he was the land. But the habit of the people has been so long confirmed that the laws were obliged to yield to the general, and have now gone so far as to pass the Stat. of Uses.

At the time of the composition of our ancestors, the English had no statute authorizing the devise of estates for the life of another. The courts of the State no statute law was heard in use. What became then of such an estate after the death of the tenant, in those States? It cannot descend, for such an estate in fee is uncertain, & cannot escheat, for it is a new in that part of an estate cannot escheat. It cannot go to the executor because it is not property. It goes therefore to the first occupant, who may hold it during the life of the cestui que vie.

## Descent.

The term "Hard" which is found in almost all our statutes of descent, is used in a very different sense from what it is in the feudal law. In our statutes it means an "of the kin." In the feudal law it means a fief descendant. The first time in which the word was varied from its original signification was in an act Nov. 1, 1798 that regulated the descent of land in a new instance

So far as to unscriptural words of the Statutes of descent in the several States it is necessary to be well acquainted with the 1st Chap. 2, regulating the distribution of personal property. That is the basis of most of our Statutes, though those statutes differ in some respects from each other.

Previous to the revolution, in most of the States, property descended, as in England to that time, then law been continued in Virginia.

The terms made use of in the Stat. Ch. 2, are similar to those which are adopted in most of our statutes. The latter, therefore, are to receive the same construction. Else, the greatest confusion would be introduced. When the words "murder" is used, in Statutes here, we are to resort to the English definition; and so it is, of other technical words.

By the Stats. 22 and 23 Ch. 2 it is provided, that when a person possessed of personal estate dies intestate, the property must be distributed, one third to the widow, and the residue to the children, and their representatives. Lord Ch. J. 78. 4. Burns. 1.2.

This distribution is always made per capita, without distinction between males and females.

Our Statutes respecting real property are analogous. Suppose one of the sons is made heir, his children will take his proportion.

# Statutes of distribution.

Eq. Ca. Ab. 249. Co. Litt. 78. 1. Atk. 455. 1. P. Wms. 595. Pro. Ch. 54. 2. Sess. 215. 3. P. Wms. 50.

When the children are all in equal degree of kindred, they take per capita; otherwise per stirpes. Suppose the sons of the intestate, are all dead leaving children. These children being the only surviving and equal in their relation to the intestate take per capita and not, by proportion, to which their fathers would have been entitled. The estate must be divided then into as many equal parts as there are grandchildren.

4 Vern. 60.

By the words "next of kin" in the statute, to whom the property accrues, if there are no lineal descendants, what persons are meant to be designated? This depends on the mode of computation adopted. In those states where no particular mode is provided, the English practice under the Stat. 22 & 23 C. 2. is adopted, viz. the computation in the civil law. The mode of computation in the civil law is this: "Lineal" proceed from a common stock, from which the relations, whose relation you wish to ascertain, some descended. Begin with the ancestor who is the intestate and come up to the common ancestor and then to the relations coming down to who is sought in the "next of kin" to be tested in a degree corresponding with the number of generations.

Vern. 334. 1. P. Wms. 41. 595. 2. Vern. 214. 2. Atk. 523. Ro. Ch. 527. 2. Vern. 235. 1. P. Wms. 595. 2. Atk. 118. Co. L. Rep. 23. Lev. 69. 78.

1. P. Wms. 53. 1. P. Wms. 41. 1. Atk. 282. Pro. Ch. 527. 1. Atk. 454. Sess. 213. 215.

If the kindred are in equal degree, as in the case of the children, the estate is divided as in the case.

In this Ed. there is no clause prohibiting the right to ascend.

In the descending line, representation does not exist infinitum. But representation in the collateral line, stops with brother & sister's children. But "next of kin" never stops. A. dies, leaving no children, or issue of children; and leaving two brothers. The estate goes to them, as "next of kin," and their representatives. Suppose the brothers were dead, leaving no children and grandchildren. These grandchildren could not take as representatives to their parents, because representation stops, with brother and sister's children; and the estate passes to the next of kin. The Stat. of Conn. 2. 90 adds the mother to an equal degree, with the brothers and sisters. Have there no such Statute, she would be in equal degree with the father, and before the brothers and sisters.

In the law of Massachusetts, there is this clause introduced that the next of kin shall not take, unless they stand through an ancestor, nearer to the intestate. These words have been adhered to, except in an unsettled case, which on principle, cannot be supported.

Perhaps there is some prohibitory clause, in our Statutes, the half-blood will take as much as the full blood. For, in computing kindred

1 P. W. 27.
1 P. W. 25.
1 P. W. 594.
2 Ves. 203
Prec. Ch. 23

Gorlab. 74.
Pl. Tolupe
Cuch. a. a. hol.
in. in. ratio.
2 Ply. 544
1 Atk. 455.

2 Serg. 483. no. 7 Devises are the quantity of blood, and
1 Ram. 237
2 Ram. 403 only by the provincials. This was settled within
2 Ram. 124 contra 5
1 Rw. 53. six years, after the Statute of Charles, was made.

By means of the Statute, provision is made that the estate shall not go to those of the half blood, who are not of the blood of the ancestor, from whom the estate descended. This provision is introduced in our Statute, and in the Statute of Mass. & Ohio, and some others. An estate, therefore, which the intestate acquired by purchase will be accounted as a different estate distributed from that, which governs in the case of an estate acquired by descent. Thus in the former case the half blood inherit this as well as the whole, if no provision to the contrary is made.

Ram. 150.
4 Rawn. 365.
2 Atk. 115.
1 Serg. 88.
2 Salk. 118.
1 Salk. 239
2 Ram. 710.
3 Rw. 49.
Ch. Cath.

A posthumous child is equally entitled with the other children. But if the distribution takes place immediately, on the death of the intestate, the posthumous child is considered as in esse, for the purpose of taking only descent as it works in the person who is to distribute (according to the rule) to most degree, according to the number of children, whom he finds in being at the time of distribution. This latter opinion, however, is unfounded.

1 Ju 286

In order to the intestate a sufficient portion, it must be made, when original children are there left — and they have been taken to take per stirpes and not per capita. B. & Ku. is not con-

Lord Ivey, was the decision of some lawyer or judge, to overrule that decision. It was made during the revolution, in 1688, when the term where the 5th was in remainder was in expression and no lawyer in the 5th to question its propriety.

In making the statute of New York, the revisers have avoided the terms "of kin," and "representation," and attempted, at length, the English construction in this place.

Representation among collaterals, never extends beyond the fourth degree. 1 Ph. 594. 25. Roe. Ch. 28 Sick. R.

There is an exception from the general rules, and symmetry of construction, of this statute in the case of grand parents.

The next of kin have always a right to take, (though somebody else may take by representation before them). That is, the "next of kin" never stops, as does the right of representation.

The exception which was before alluded to, is the case of the grandfather, or the brother and sister to him, whether of the whole or of the half blood; and their children if the grandfather died, will take per stirpes, to the exclusion of the grand parents if other brothers or sisters were still living. This point was settled by Lord Hardwicke. 3 Atk.

If the intestate died without any relatives the property in ques^n belongs to the King: Were if there was no escheat it would seem that it is open to the first occupant.

# English law of descents.

1. Real property is entirely governed by the local
circumstances of the person last actually seised. The
nearest in [illegible] succeeds to the total
exclusion of all others. This maxim is
disregarded in regard of the states, and accordingly
without actual seisin, is allowed to determine
the heir.

2. By the English law, the real estate descends
to the eldest son to the exclusion of the other sons
and daughters. Primogeniture in the states,
confers no such exclusive right.

3. The estate goes to the representatives, also
of such eldest son, if he is dead, leaving
representatives whether they are male, or female.
Feudal principles seem to have governed in the formation of this rule.

4. Males always in the English law, exclude
females of the same degree. These rules are
not disregarded in the American law.

5. If there are no male descendants, the land
descends to the females altogether, in coparcenary.

6. If one daughter is dead leaving children,
these children will take what she would have
taken, preserving the rule that the males are
to be preferred.

But if both the daughters are dead with children
living the children of each take per stirpes, preserving at the same time the rule that males are
to be preferred.

English law of descents.

1. If the intestate died without issue it is a maxim of the English law, that the estate should ascend. The next collateral relations of the blood of the first purchaser would inherit, subject to the foregoing rule & regarding the priority of males. This collateral heir would be of the whole blood or he would be excluded. The blood shall rather ascend than go to the half blood.

In those states where the common law of descent is grounded in the collateral line, the half blood are not usually entirely excluded.

In all collateral inheritances the male stock is preferred to the female unless the blood have a good accession from a female, in the line. In looking then for a collateral heir you must pursue the paternal stock of the paternal line, and not go into the maternal branches of the paternal line, until a failure in the former. If none are found in either of them, pursue the paternal stock of the maternal line, then the maternal stock of the maternal line.

The phrase "of the blood" has two significations. In general sense was "lineally descended." But now the term "of the blood" is used to express relationship. It is important to ascertain in which of these senses it is used in the American Statutes. In most of the N. E. States, the meaning of the term must be collected from the rest of the Statute. In general it has its modern signification.

The Statute of New Hampshire, as to the descending line, is precisely like the Stat. Charles. With respect to the collateral relations, it is also similar to that, except that there is a provision that if any of the children die without issue, before 21, his share will go to his brothers and sisters.

This Statute likewise represents the mother in the same manner as the Stat. James.

In the Statute of Massachusetts, (and in the Stat. of New Hampshire.) in another respect, there is no difference, whether the estate is derived from an ancestor or acquired in purchase. In the second case, it is like the Stat. of Car. II. and requires an actual decision. If there are no children, the entire estate goes to his father, if he is dead, it goes to the mother, and brothers and sisters. The mother is represented, as by the Stat. James. If there had been no provision that it should go on failure of children to the father and, it would have gone in equal shares to the father and mother. But if the brothers and sisters are dead, leaving children, those children will not represent their parents, and the mother

# Statutes of Distribution in the Several States.

* By the Construction of the Stat. 22. C. 2. Some the mother stands immediately in the relation of a brother or sister; if only a brother or sister, it seems where one is living, the survivor will take, you otherwise as if a brother or sister was living. Ruston Mayo. it is said so.

Either the whole, [illegible] descended from the Stat. 6 Ed. 6 c. 1 in Stat. 29 C. 2 c. 3 and as this is [illegible] the word "next of kin" and in the latter there is a provision that the next of kin who claim through the same ancestor shall take the whole. But the next of kin shall take in preference to those who are more remote though they claim through a nearer ancestor.

The Statute of Rhode Island in the second section is like the others. In the concurrence, and in the collateral line the rule is the same as the Stat. 29 C. 2 c. 3 that estates shall have come to the intestate by descent or devise, and so to the next of kin of the blood of the ancestor from whom the estate came. Some particular cases are excepted out of the blood of kin from whom the estate descended are excluded. In this respect the rule is the same, as in the Longlinie Stat.*

The Statute of Connecticut in the second section is like the Stat. of Ed. 6 in the proceeding and collateral line the provision is same. Still as it is so such one contrary clause in the same section Rhode Island says that the father here can not take. The brothers and sisters will take the whole. If there are none of the whole blood [illegible] may go to the half blood, as are other [illegible] relations who are next of kin, the next of the blood of the intestate was a particular state [illegible] to the brothers and sisters of the whole blood and their representatives.

If the brothers and sisters of the whole blood are living it then goes to the parents, and there are no parents, it then goes to the brothers and sisters of the half blood and in default of them to the next of kin. Suppose in the case of a personal estate, the brothers and sisters of the whole blood are dead leaving children. Will these children take by representation, or will the estate go then to the next of kin viz. the parents? according to the English construction it would go to the parents: and though there has been one decision to the contrary I presume the same rule will be recognized in Penn.

The Statute of New York, in the descending line is the same as in the other States. As to the collateral line, if there are children the father takes the whole in exclusion of the mother unless the estate came from a maternal ancestor. If the father is dead the mother does not take with the brothers and sisters; but she is excluded. If it be a personal estate the half blood take as well as the whole. If the brothers and sisters are all dead leaving children by express provision in the Statute the children do not as in Pen. take per capita but per stirpes. Here the Statute of Pen. and the common law come nearer in to suffice its place, with exception of half blood, right of representation takes place, as in the case of lineal.

Statutes of Distribution in the several States.

The Statute of New Jersey seems to have accorded from the Com. law, without any, and to the Stat. of Ch. II does not require actual seizin in the intestate. The widow takes a share, but each is entitled to a double portion to a female. There is no such thing known in N. Jersey as a stirpes per capita. Representatives always take, according to the Com. law rule, per stirpes. If the intestate left no children, the estate according to the law of New Jersey, goes to the brothers and sisters of the whole blood, if there are such, (if not, then the rule of blood may take,) and their descendants. Here the Statute rules, but in other cases the Com. law rule would prevail.

In the State of Virginia, there is an express provision to prevent the operation of the maxim semina sanguinis retinent. In the descending line, it is said the estate shall go to the "children and their descendants," and it is also provided that they shall take per stirpes, unless they are of equal degree, and then per capita. If there are no children or their issue, the estate goes to the father. If he is dead it is provided that it shall go to the mother, brother, and sisters and their descendants, and the Stat. of Ind. &c. right Mag.

There is no provision in this Stat. that a person claiming that right after brothers and sisters children

[illegible] can not [illegible] or exclude the half blood and divide them half shares. [illegible] of all them, the estate is divided into two moieties, one of which goes to the paternal, and the other to the maternal line. If it is supposed there is no father or mother, then give the estate to the two grandfathers, and then so round down. The grandmothers take one of each share with the uncles and aunts. If there are none of these then give the estate to the next of kin.

If either the paternal, or the maternal kindred is extinct then the two moieties are to be joined together and the whole estate go to the other line.

If all the children of the whole blood are dead the half blood take all the estate.

Barbados has their statute, are capable of inheriting and transmitting inheritance on the part of the mother. Bastards marriage legitimate the child.

In Virginia no regard is paid to the person from whom the estate came.

The Statute of Pennsylvania is complicated and obscure with uncertainty. For the surviving one it is similar to the rest there is not a word said about any of kin in the statute but all is included in first the wife. Now [illegible] in it [illegible] in the same.

Statutes of Distribution in the several States.

The following extracts are supposed to gather up the statutes taken as gift estates, if there are no intermediates. If the estate came to the intestate by descent, or gift, or devise from some ancestor.

In this statute, the ancestor is always paternal, never maternal, never collateral. Here the right of representation is unlimited, and does not exist in Massachusetts except with brothers and sisters and their children. If the mother is living and the brothers and sisters of the whole blood and their issue, the half blood may with their representatives take a hereditary estate. In ascending of all the estate goes to the "next of kin." This is the first time these words are used in the statute. The distinguishing character in this statute is that an ancestral estate passed to one of the whole blood, and a half blood of the ancestor from whom the estate came, if such relation can be found, shall then the next of kin take. In each the ancestral and acquired estate the half blood are postponed to the whole blood. The mother or father and brothers and sisters never take a life estate in the property of the intestate.

The Stat. of Massachusetts is attended with a great deal of difficulty. It provides for the succession of real property when the owner dies seised, i.e. actually seised, of an estate in fee simple, or in fee tail. Fees tail are abolished in Massachusetts. It has been asked what estate a under takes to whom in this State an estate is devised by words which would amount to a succession of a fee tail? It has been decided that the effect of the Statute is to convert such estates created in future, into estates in fee simple.

This Stat. provides that the estate shall descend to the children of the intestate and to their descendants, if any, equally. This is explained by the 4th paragraph to mean that the children's descendants shall take per stirpes what their parents would have taken if some of their ancestors had survived the intestate. And it is questionable under this Statute, whether if all the children shall be capita or per stirpes. The words are of a doubtful import. The language is "if any further shall be alive leaving children" the children shall share equally. This term is introduced from the Stat. of Ed. and the word is never used in that Statute in cases where all the claimants are in equal degree. I should suppose therefore that in such case, they would then take per capita.

Statutes of Distribution in the Second Volume.

It is to be observed that the clauses applies as well to the collateral as to the descendants; and in the former there is an express provision that the estate should go to the children of the brother and sister, all the deceased being in equal degree equally. Representation is here as in Virginia unlimited in the collateral line.

The Statute then provides that when there is no issue of the intestate and the estate descended on the side of the father it shall go to the father. What is meant by the words "on the side of the father" not stated. It seems that the estate descended from the father himself had from some relation in the paternal line. But how could the intestate get a descended estate while his father is living unless it came from his father. It is apparent to me that the drafter of this Act has not used his word "descended" in its technical sense. The father inherits in place the ancestor to the son from some paternal relative. The word descended appears evidently used in opposition to the word purchase in its technical sense, and means any mode of acquiring an hereditament, whether by gift or devise from any ancestor.

There is no father or any other of the paternal line to be ancestor. — Express estate is not to go to brothers and sisters.

[illegible] provisions [illegible] the said ways of inheritance, that no [illegible] uncertainty [illegible] after brothers and sisters children.

If the paternal grandfather is dead [illegible] in time be then the maternal grandfather will be entitled to it.

In the case of an accounted estate no preference is given to the whole over the half blood, however the matter is of the blood of the ancestor from whom the estate came.

If inherited estate, which the [illegible] means "hereditaments" in the limited sense of the word, was in the intestate and has come in time to the brothers and sisters of the whole blood, and there are none in equal degree equally, and no children of those to the brothers and sisters of the half blood to inherit from. The half blood then cannot take while there are any of the ancestral or the whole blood remaining. In default of these the estate goes to the father; and if there is no father then to his mother; if there is no mother it will go to the grandfather and his descendants and then to the grandfather of the maternal line; in default of these the estate goes to the maternal grandmother and father.

# Statutes of Distribution in the several States.

The Statute of North Carolina provides that real property shall succeed to the issue of the owner who died intestate in the same manner as personal property. When any person who would have inherited such property the intestate, his children will take his share. If the intestate died without issue leaving an estate which came to him from an ancestor, to whom the intestate would have been heir, the estate will descend to the next of collateral kinsmen of the intestate who would have been heir to the ancestor. As to any other estate, the provision is that it shall go to the next of collateral kinsmen, either of the whole or half blood.

In this Statute, there may be some doubt whether the words "of the blood" which are used are meant to be taken in their primal sense, or according to the modern construction.

If the estate is an ancestral estate it shall go to the father and mother as tenants in common and if one is dead the whole goes to the survivor.

The Statute of Georgia provides that real and personal estate descends to the next of kin according to the degree of consanguinity, and in case there be children or issue of children living, the estate will take in equal shares and in default of children or issue of children living, it goes to the father, if living, if not living, to the mother.

and if there is no father then to go to the mother and the other remains to the eldest.

If there is no issue, father or mother the widow takes a moiety and the remainder descends to the brothers and sisters of the whole blood and if there are none to descend to children, then shall it go with the equally with the brothers and sisters of the half blood. If there are children of the whole blood and none of the half blood being the estate descends to the children of the father. In default of all these, the estate goes to the ancestor.

# Devises, by George Reere.

The law of devises is a very interesting branch of the law. Devises were customary among the Saxons, before the conquest. But after this memorable epoch in the English history, alienations by devise, became inconsistent with the feudal restraints which were then introduced. Personal property however, might always be devised away, by will. The restraint upon alienation by devise, continued longer than the restraint upon any other mode of alienation.

The Stat. 32. Hen. 8 which first gave the power of devising real estate, enacted that such devises should be in writing. The Stat. 34 Hen. 8th which soon followed it was made to prevent certain persons, from making devises, such as feme covert, infants, idiots, and persons of unsound memory. These statutes were in force when our ancestors emigrated to this country. Afterwards the Stat. of 29 Car. 2 was enacted, the statute of frauds and perjuries, which became important to us, inasmuch as it was adopted in the state, and adopted long after it had become a construction by their Courts. Of course their law under their statutes with the construction of their Courts was adopted here.

Devises. general rule of construction.

The term devises strictly means an alienation of real property by a man's last will. Similar alienations of personal property are called testaments.

By the Stat. Henry estates in reversion were not devisable — Where no alteration is made by Statute in this country such an estate would not have be devisable.

In some of the States, and among others, in the State of Connecticut. The word "immediate remainder" which is introduced into the Statute of Wills & among others, who are disabled from devising, are omitted. This has given rise to a material question, whether a married woman could have devise her realestate.

Pa. R. R. Stat. Devises. Sec. 1

Davis R.

There is a difference in the construction of the words used in deeds, and wills, which is very important, and I think unfortunate.

In a deed an estate in fee simple may be conveyed without the use of the technical word "heirs" provided the intention of the devisor can otherwise be ascertained; as by a devise to "A forever" or to "A in fee simple" &c. But in wills everything yields to the superior power of technics.

The reason of the distinction doubtful. It is that the law regarding alienations by deed was established in times when men were governed rather by the rule than scholastic subtilty.

But the intention of the testator does not prevail in a devise, when he attempts to devise an estate, which is not known to the law, or which it does not admit of; as if a man should attempt to entail personal property, suppose one should give an estate by devise, to his heirs male. This is not an estate tail, because it is not to the heirs male of his body, and the law knows nothing of a peculiar succession to heirs male only.

By an "inconsistency with the rules of law" which shall thwart the intention of the devisor, is meant an inconsistency in the things to be devised, and not in the words used.

The Stat. of Wills gave no new power, of creating estates which were not known before. 1 Rl. Ab.

The general rule, with the qualifications which have been given, is extremely important in the construction of devises, viz. "that the intention of the testator is paramount to the force of the expressions which are used." All the questions which have arisen in this Court have, as to the effect of words by a devise, depended on the intention of the testator, if it can be ascertained with 8 Pet. Hence the expressions "all my estate," "all I am worth" have been holden to pass an estate in fee: than a devise of "Blackacre" by name to A, will convey an estate tail in A, but in these words, and one

devise: for the intention to convey a table estate is here supposed to be as clear as in the other cases.

The operation of devises of real property is distinguished from a will of personal property, as it respects after-purchased estate: for the former can it pass to the heir at law: in the latter, it passes by the will. For personal property is so fluctuating, that it would be impossible to ascertain precisely, how much the devisee was possessed of at any particular time.

But after-purchased real estates may be conveyed by a republication of the former devise, which then operates from the time of republication, upon all property, which can be embraced by the words. A republication is in effect giving a new date to the instrument.

A devise is ambulatory, (i.e. revocable) till the death of the testator; and is subject to revocation, alteration &c, according to his pleasure. Nothing is passed at the time. Suppose a person a witness to a will, to whom a legacy was given — is he interested at the time, so as to render his attestation inefficacious? This has been a great question in Eng.

Bro 417. Ve

1 Atk. 177

Before the Stat. 29, a devise might be revoked by parol — but the words must have been used amounting revocandi.

No particular form of expression is necessary in a will, as has already been observed.

It has been a question whether a mere possibility, can be devised, while it remains contingent. It was formerly held that such an interest was not devisable, or alienable in any way. But the point is now settled directly the other way; and that the interest is devisable on the principle, that the owner of a possibility has all that seisin, which the nature of the estate admits of.

In many of the States actual seisin is not required to enable a man to devise, as in Eng.

By the Stat. Henry 8. no property is devisable, except property holden in possession, whether in possession, or reversion, however, made no difference. The seisin of the tenant in the latter case is considered as the seisin of the owner of the fee in reversion. This rule prevails in all cases, except where there is a power in obtaining the seisin, found operative to bind and, whatever is done by means of it, is void as if it never existed.

An estate in joint tenancy, is expressly excepted from estates which are devisable by Stat. Henry. But the words 'all my estate,' would in this case, by construction convey a joint tenancy.

An estate-tail cannot be devised. Neither at common law could an estate pur auter vie. But this is now provided for by Stat.

1 Ld. R. 251.
Ibid. 177.
2 Bro. 124.
1 H. Bl. 70
Bro. P. 25.

Ry. & M. 94
6 East.
Co. L. 41.

Devises.

Our Statute provides for the devise of "all estates" in

## Decisions on the Statute of Henry 8th

In the 20th, under an devise in fee, was in a devise than fee, which were before in use. Between the devise of the 1st Jan. 1st and 1st 2d, it was decided that the whole estate in fee must be devised at the same time. But the law is now otherwise settled.

Bac. Ab. 12-13. 1 Rev. 548.

If a man makes half a dozen wills, all contradicting existing, he is a lunatic if they are considered with each other; all will be void for him. But if the last maker a different disposition of the property, it revokes the others. Such a case when one made a will giving Blackacre; all his property to A, and a the words inserted, and then made another will, giving Blackacre to his wife for life, remainder to A. the same time to have immediately a certain sum to A. It was held that both wills should stand, and that A should have the reversion after the mother's life estate had expired.

Show 145 55

Another point settled during this period, and which is now considered as law, is that if a will refer only executor, which refers to another paper is left by the testator, both papers shall be taken together, as constituting the will.

Bac. Ab. 144. 1 Rev. 530.

If a second will is made different from the former it will be a revocation of that.

A codicil may be a revocation. See Swift.

Rev 1808. Stat. 29 Ch. 2. c. 3. s. 12.

[illegible] a man in a state to his friend, [illegible] [illegible] disposal of his property, that was a good will.

It was also settled that when a man had given directions to his scrivener, to write his will, which done, & the scrivener wrote it, and brought it to him while sickness, he insinuating him was that he had complied with the directions which had been given him.

## Construction of the Devising clause in the Stat 29 Ch. 2. c. 3.

The Statute of Ch. 2 requires certain formalities, to make a will valid, which if not complied with, make the devise void in that state.

The first provision is that "all devises of lands which are devisable by Stat. 32 Hen. 8 or by custom, shall be in writing." This clause has been construed as an alternative, from the making of it necessary, to have those devises of lands, which were devisable by custom, in writing: for all other lands were required to be so by Stat. 32 Hen. 8.

The Stat. Ch. 2 further requires "that they should be signed "all by the party devising, or by some other person in "his presence, and by his express direction, & attested and subscribed, in the presence of the devisor, by three or more "credible witnesses, else they shall be utterly void."

No technical form is used, as required in the Stat.

a Revising clause in the Statute of Frauds.

2 BSR. 291. The lex loci, where the land lies, always occurs in regard to the manner and form of conveying.

It is not unusual for men in mill, to devise a power to another, to transfer their property. The appointee in such case takes the estate under the will, which must be executed with all the legal requisites. This is a rule which has been established by the courts.

1 Vt. 79. 2 Ch. 268. 285. 2 Ferg. 179.

The second requisite of the statute is that the devise should be "signed by the devisor in the same presence in his presence, and at his direction." The question immediately arose, what was this "signing" which was required? It was decided that a recital in the devise "in the presence of the devisor" of the testatrix was a sufficient signing. Much doubt the original correctness of this decision, the authorities seemed to be in favor with a slight contrariety. Why, mean this the devise would not a direct recital be another case, with the express sanction of the devisee, be a signing?

1 Vad. 219. 2 Ch. 264. 3 Wil. 318.

The question next arose whether the signing was a signing within the act, and it was decided thought that it was. but this opinion has since been overruled.

Next arose this question. The devisee wrote the will, with his name at the top, and it was held to be invalid to raise to open and his name was

recognizitatis him. The C.J. said that there was not a sufficient signing, for it was a phrase in this case the court said that in the case of the testator he said was not complete. He said does not require a seeking, though it is always customary.

A third requisite is that the will shall be "attested and subscribed by three credible witnesses in the presence of the testator."

What is this attestation evidence of? It is prima facie evidence of a signing by the testator. But it is also said that the witnesses attest the sanity of the testator. But surely this is overlooked in practice; and I cannot conceive Law it is possible, if this is the case, a witness can afterwards be admitted to swear the sanity of the testator. Yet this is other case.

1 Ch. Ref. Prerogative Court. 2 R.S. 506.

The presumption of law is that the testator is sane, and therefore the attestation could raise no greater presumption of this fact, than already exists.

What must the witnesses be able to testify? to show that the testator signed it. The law does not require that the witnesses shall all be present at the time — and it is settled, that if the testator acknowledges to the witnesses, that the paper before them was his will and that he signed it, it is sufficient to enable them to testify to the fact.

2 Ph. 102

Cases — Statute of Frauds.

3 P. Wms. 253
2 Ver. 455

But it is not sufficient merely for the testator ~~to~~ to say, "this is my will".

The question must arise, what is an attestation in the presence of the devisor? It is settled, that if the subscription is in such a place, that the devisor might have seen it, if he had chosen, without being removed from his present situation, it is sufficient. Hence when a window was interposed between the testator and the witnesses, through which he might have looked, the attestation was in his presence.

2 Str. 81
1 Salk. 275
Bro. Ch. 99.

But it is said there is a case where the testator might have seen if he would, and yet it was no signing in his presence. That case is a case of fraud where though the will was executed in the common form yet it was proved to collusion with their backs turned, at least this was the case mentioned for, and recognized in the C.

1 B. & Ad. 748

Lord

In new case the witnesses subscribed in the corporal presence of the testator, though he was mentally incapable: the C. L. C. thought the intention of the Statute was that there should be a mental as well as a corporal presence.

How shall this signing be proved? The law requires the attestation of three witnesses, but it does not require that all three shall be examined to prove that the fact of the devise was read of the testator, the C. of the same the sixth section requires

Perkins — Statute of Frauds.

Law was to be introduced, because there was no
is the hand, the same of witness.

But suppose the witnesses were not all there
and at the time, so we can not decide what
is to be done? Upon oath prove their hand-
writing, and that of the testator. But does
this prove that their attestation was in the pres-
ence of the testator? No. This must be proved
by the only surviving witness, and
if the other sign it, their hand writing
must be proved.

1 Bl. R. 305.

1096.

Suppose of two witnesses, one says he saw
the testator sign it, and the other (admitting
his attestation) says that he didn't see the
testator sign it — this he shall not be admitted
to swear, for by attesting the will, he has ac-
knowledged this fact, and it would be intole-
rable, to permit him afterwards to deny it.

The Lord further cited that there could be
three or more credible witnesses. In ancient
times some called upon attestation in these
words. A made his will which was
attested by two witnesses, and afterwards made
a codicil which was also attested by two witnesses.
None who attested the will had seen the cod-
icil, and it was holden that the attestation was
not sufficient. A codicil was
executed by three witnesses, in the absence of the
testator, stating to be the attestation was taken

Devises — Stat. of Frauds.

Held in a case where the codicil was properly attested on the same paper with the will, it was holden to give validity to that, though the will was not properly attested.

In another case, where a will was made on several distinct pieces of paper, and signed on the bottom of each, and the will was properly attested, the last signature, it was holden to be a sufficient attestation.

Again where an illiterate man had made a will without being properly attested, and afterwards made another writing consistent with and referring to the former, this being properly attested, it was holden to give validity to that.

It appears to me that this conclusion follows from this rule, that whenever there is a regular codicil annexed to the will properly attested, the will has received it will give it validity.

Ex. 58
Pr. Ca. 24
2. Vk. 177.

The next question turned upon the construction of the word "codicil" as applied to the will in question. This question has created more difficulty and elicited more thought in Westminster Hall than perhaps any other which has ever arisen upon the Statute of Frauds.

The general question was whether the attestation of persons who had been witnesses, either in order, under the Statute, or instrumentum testamentum, could never be admitted, and the case [illegible]

under the will to swear as the examiners. But can they be required so far from their interest, as to make them good witnesses to attest from the beginning? It was contended on our side that the meaning of the law was that the witnesses should be "credible" at the time of attestation. On the other, it was claimed that there was no interest at the time of attestation, in a legatee and that if there was, it ought be forgiven.

From this question in a different light from that in which it was made by the Commissioners. I think the legatees ought be good witnesses, because they had no interest at the time, the will being ambulatory. The only reasons for rejecting them, on changing their competency at that time, is that they have a hope. But suppose you can extend this to proof that they did not know of a provision in their favor at the time — this would remove the hope. And if there was, the objection would go only to their credibility and not to their competency. For at most, their interest is contingent. I suppose that any name is a good testamentary witness, who could not be excluded in an action at law on any of the common grounds of infamy, or interest in the event &c. But it is contended there is some meaning in the word "credible," which is against this rule. If they did mean to exclude a person of this description, such as legatees — by that more

Devises. — Statute of Frauds.

The [illegible] is very [illegible]. It seems that the word "credible" was a word thrown in, & if [illegible]
Sir 1253. that any [illegible] of this [illegible] the word
"credible" includes competence and credibility.

2 Bl. 377. If this opinion is [illegible], I think it is too much to say that a man who could not be
Burr. 414. admitted as competent in a trial at bar should be excluded from attesting because he wanted credibility.

Ld Camden opp. [illegible] v [illegible]. [illegible] 5 Rep.

Balance of opinions in Engd [illegible] Lee + 3 + Ld Camden + 1 = 6
Ld Mansfield + 2 + 3 = 6
[illegible] Court 3 + 3 v 2 + 3 + [illegible] in favor of Ld Camden.

But I think that if these witnesses were incompetent at the time of attestation their incapacity can never be purged & the instrument afterwards be made [illegible]. "That which is void at the beginning can not afterwards be made good."

But if the witness only become interested afterward, it was always a rule in the Ecclesiastical Court that he could by releasing his interest or by payment become a good witness.

Suppose this person was a good instrumentary witness at the time and afterwards [illegible] his subsequent interest can we hold [illegible] the [illegible] as good as the other witnesses, for the same [illegible] if this one was infamous or [illegible] [illegible] the will and attestation [illegible] their testimony? I think it follows of course from the opinion I have given.

In consequence of the decision in [illegible] the [illegible] 25 Geo. II was enacted [illegible] void [illegible] to the witnesses. [illegible]
[illegible]

[illegible] of Parents

This question was [illegible] before the Supreme Ct. at the last term — Decision of the point was postponed 3 to 4 — The next time the question came before the Ct. there were six on the bench and the question was decided in the same way, the 4th. Justice giving a dissenting opt. The decisions were reversed by the Supreme Ct. who sustained the Parson against Freedom.

A case, which came up from a small town, came up before our Ct. of Errors since that time in which at first it may appear that our Ct. of Errors have contradicted themselves — but this is not so. The decision was founded on a particular law of our state, "that the minutes of a proceeding are read without there being any entered."

Were told by the Secretary writers that it is necessary that the will shall be published. There is not however a word said about this in the Statute. I conceive that no act, or the [illegible] a compliance with the requisites of the statute is necessary to constitute a publication.

It is often necessary that the testator will have [illegible] at the time of attestation. This is always a question of fact, for the jury to determine.

In Connecticut we have that a will may be good as to personal property, tho' void as to real. This will of course amount to testate intestate. There is no doubt [illegible]

# Revocation of Devises.

The actions are either express, or implied. As to implied revocation, our law must be drawn from English: for upon these, the English statute does not operate. Had, Stat. is more explicit upon the subject, which is here in force. In one of the Stat., the statute has not been adopted, as to the revocation of wills.

This Stat. requires certain solemnities to be used, for the revocation of a will, whereas the Common law does not require any thing but evidence of the intention to revoke. Before this Statute an express revocation implied as much as by marriage, or otherwise. See Statute of Comm. Law with other [illegible] 115 [illegible] 117 [illegible] 73 [illegible] on the subject. And question whether any [illegible] required to written, [illegible].

Both the Statute and the Common law require that there should be an express revocation; though in fact none, or words which implied amounted to a revocation if the intention were apparent.

The expression of an express intention to revoke, as if he mean now to intend to revoke any will [illegible] is not sufficient.

[illegible] 512 An implied revocation arises from some [illegible] 487. [illegible] 287 [illegible] the second which absolutely implies [illegible] 289. [illegible] intention to revoke.

Revocations — implied.

A devise under a will may be revoked in some act of his, sufficient to raise an intention to revoke. Dr. R.B. 344.

A third kind of implied revocation is that which arises from the express operation of law.

An example of an implied revocation of a will by a collateral act of the devisor is the making of a second will inconsistent with the former, in a material point. I think the principle is carried too far, and that such an act ought to be a revocation pro tanto, only. Bro. 178 86

A codicil may be a revocation of a former will if there are express words of revocation used; otherwise, it revokes it, only pro tanto, as it is inconsistent with the will.

In one case, it was found that when a second will made, which cancelled not the devises, differed from the former one, but what had expressed was, could not be ascertained. The Ld of Nottingham decided the findings of the jury amounted to nothing at all and did not revoke the former will.

When the second will, however, is made under a false impression, as to a fact (not as to the law) then the second will, is not a revocation of the first; as where the devisee in the first was supposed to be dead.

Revocation implied.

But in a case where the second will was made under a false impression as to the law it was holden, from a principle of justice to be a revocation of the first. The point was a decision to a charitable institution, which the testator was incorrectly informed, was within the statute of Mortmain (i.e. Statutes of Mortmain, being deemed inapplicable to the circumstances of our country, have always been disregarded in these Courts, though they had been law in Eng.d at the time of the emigration of our ancestors.) But in the principal case, where, when the second will was made under a false impression as to the law, shall it amount to a revocation? Because a contrary decision would produce much confusion, and destroy the symmetry of the law in analogous cases: for it is a general rule, that "every man is presumed to be acquainted with the law."

Mon. 25.2. A second will revokes the first — a third revokes the second — is the first will revived? or does the estate go to the heir at law? The decision are, that the first shall be revived by the revocation of the second.

Suppose the first will be cancelled or destroyed in a similar case it would not be revived, certainly, if cancelled by the testator: if it is destroyed by some other hand, the law must be the same, for then it would be as well, according to the [illegible] rule.

Revocations — implied.

Suppose the first will, in the case supposed, a. Cap. 40
effectually revoked by the second — and the second is afterwards destroyed or revoked? I can see no reason for the distinction, but the decisions have been, that the first is not revived by the revocation of the second. The facts attending the case, however, are somewhat peculiar, and might make a difference. The first will was cancelled — and the second was also cancelled. But it is said there was a duplicate of the first which was not cancelled. It is a rule of law, however, that a cancelling of one, always amounts to a cancelling of the duplicate.

A will may be revoked, by an alteration in the circumstances of the testator, which raise the presumption that his intention altered. As if a bachelor made a will, and afterwards married and had a child. The birth of this child is holden to be a revocation of his will. But there is no case which says that a mere marriage is a revocation — and certainly the principle will reach this case. It is not the birth of a child, strictly, that revokes a will. It is the happening of such events as shew that the intention would probably have altered. Suppose a man worth 100,000$ had made a will and died in every 50,000$ — the subsequent birth of a child would not be a revocation. What would be the conduct of a reasonable man? is the question. I think

## Revocation — implied.

Doupl. 35 — The elementary proposition is assumed that there
Andy. Off.
4 Bin. 271.
2 192.
must be a total cancellation, or else there will be
Lord Ra. 441.
1 Ambl. 214.
Ff. 1. 49.
no revocation.

The proposition the Ch. Just laid down is this — "there is a presumed intention to alter, but on an occasion in which there was no such presumed intention. A man married and died, and left a will, and wrote the supposition that he would never have any issue. But the fact was a child was born 8 months after his death — it was holden that there was a condition to the devise implied, that it should be revoked by the birth of a child unprovided for."

A question has arisen which has given rise to a contrariety of opinion in the Eng. Courts. If a man makes a will and afterwards becomes insane. No matter how, until there is an entire alteration in his circumstances and ones. Does this alteration of his circumstances revoke the will? The law is settled by the decision, that it does not.

See Doe 25. If a lunatic makes a will and afterwards in manner his incapacity is considered to be a revocation.

[illegible] of implied revocation arising from [illegible]. If a man makes a will [illegible] another [illegible]

See Doe 39. [illegible] of the revocation [illegible]

See 1 Bro. 330 [illegible] 4 [illegible] will [illegible]

See Doe 76. [illegible]

A devise that it will, proceeding on the ground of intention in the testator, be a devise of the estate from the said devisee. The devise is made settled. Than if in many a case matter the second disposition, for a devise made revocable works, will be can also revoke.

This rule applies to all cases, where the person is incapable of taking, as a corporation under the Statute of Mortmain; the devise then in this case would take. And if the devise to a corporation was a second will, it would revoke a former one.

Bitterbo are now considered the intention, as the governing principle.

He dell was considered the devise in which an alteration in the estate, or the exhibition of an intention is considered to be a revocation. Suppose A devises Blackacre to B in fee; he afterwards makes his wife executrix to provide for his wife, conveys the estate in trust for himself, for his own life, remainder to the use of his wife for her life — here, as in the tion appears of revoking the devise in fee, and yet his situation in the estate was holden to be a revocation.

It has also been decided that where A. being seized of an estate tail, devises it, and to give validity to his devise, bocks the estate tail, and turns it into a fee simple which was devisable, this alteration was a constructive revocation.

Brown 52
9 Mod. 190.
10 Mod. 227.
3 Atk. 72.

1 Rol. 616
8 Co. 99.

1 Rol. 616
1 Ven. 92

3 Lev. 104

3 B & C.
Cowper v. Fitzgerald
Dome

[illegible]

[illegible] 2 Atk 403

[illegible]

[illegible]

[illegible]

[illegible] 1 Ves. 154. 3 Atk 740 2 Ves. 815 Ra. 968.

[illegible]

[illegible] Ins. 5. 54.

[illegible]

[illegible] Ranking & Ken. Ser.

[illegible]

[illegible] Ros. 610

[illegible] Ros. 374

[illegible]

there can be no doubt. But if the will can be found, then the question is quo animo was it done?

Notwithstanding every thing which has been said on the subject of alienating part of what is now devised only to an adopted of the estate, & then it will not revoke it. As in the case where under the Stat. Devises, & the estate for life limited to Ed. Ed. 23 one after married woman, was holden not to revoke a devise. Though this may be inconsistent with one or two cases, more decided (we forget the Lord) I cannot not honour, for in that case there was a positive intent to the trustee.

Express Revocations are governed by the English Statute. Parol proof can be given of the fact of an express revocation aside. But this statute provides that no devise shall be revoked merely by some other will or codicil expressly revoking it, or by some other writing (tho' not a will) signed by the devisor, and then not respecting signed by him in their presence.)

A second will at common law, without a clause of revocation, if inconsistent with the former was construed to a revocation. The meaning of the Stat. is that there shall be no express revocation the parol. implied revocation is to remain as they were at common law.

A second will, to be used as an express revocation, must be a good devising will, executed according to the Stat. Frauds &c.

# Revocation — Exp. prop.

Ord 258
Hom 2.
Bath 79.
2 Atk 272
1 Pr Wms 343.

If the testator intends to revoke by a will, it will not be a revocation, unless he expressly or tacitly declares to the effect that if he had understood the destination would be revoking, it would have been operative.

The usual clause in the statute of Revocation provides that a revocation may be made by "tearing or cancelling or obliterating."

In Scotland, there is no revoking a will, as it stands now, a testator may revoke by any writing signed by himself. The act of Parl. would probably have a view of the mischievous consequences of introducing parol revocations, requires a revocation in writing. It seems however that the evil is one, which the legislature and not the old statute remedies.

There is a difference in the words of the statutes relative to revoking and of the analogous part of the Scots revoking act. The former requires that three credible witnesses shall attest "in the presence of the testator". The latter, that he shall sign "in the presence of three witnesses." This parental act accordingly has been construed into an established construction.

Tomp. 52.

That [illegible] the statute which provides that a revocation may be made by "burning, cancelling, tearing or obliterating" the revoking instrument, [illegible] burning of it was not required to be done in the presence of the witnesses. But the revocation, unless the revoking act is apparent.

Revocation — Proof



The intention must always be inquired into and if it is apparent, the Court testator will be satisfied to this fact, proof proof cannot always be admitted. 2 Phill.

There are cases where persons have commenced the execution of their wills and stopped, and the Ct. from the circumstances in evidence have decided that it was no revocation.

A man had made a will and afterwards, had determined to make another; he requested some one of his family to bring him his will, & gave it a small tear after which it accidentally fell on the fire, and she took it up and laid it by: the question was whether this tearing commenced to a revocation and it was decided that it did. Cow 512. Subdivision

A testator made some alterations in his will, but so that the Ct. L.d that they were not so great as to amount to a revocation: though it should have been done by a codicil instead of obliteration. Could the witnesses have sworn to the execution of that very will?

## Republication.

A will may be republished, either by a revocation so as to revive the very same will. (This is common sense to be true, even after an express revocation.)

Bro. Ch. 207, 97
2 Ven. 597
2 Atk. 599
3 Atk. 170

There is no particular formula in the English statute regarding republication. But a republication made for the purpose of conveying after-acquired real estate must be executed with the same solemnities as over required in the devising clause of the statute of Frauds. There must be three witnesses &c.

Co. Lit. 499
Lev. Dig. Devise 38.
3 B. W. 329
1 Ves. 497
1 B. W. 265
2 Co. 60

There is one species of personal property which if revoked subsequently to the making of a will does not pass by it, and that is leasehold estate in land.

A republication gives a new date to the will, and enables it to have the same operation which the words would have been allowed, had they then been first used.

Before the statute, any words which were spoken during republication would be enough, but now that

Bac. Ab. 655
Atk. 589
2 Ven. 440
3 Atk. 75

act lies in force and in this country no express formal republication will be good. A common law republication could be valid only if written under the statute.

There are many cases, respecting the operation of disposing codicils, which have given rise to a complicated division. Does the execution of a codicil according to the statute republish the will.

It is a rule that if the testator makes a codicil, and expresses an intention to republish, that will be sufficient. But it becomes a question, whether a codicil, without such a clause, would amount to a republication? Sir Lord Hardwicke opinion it did: for he says, every one who makes a codicil, takes notice of the will, and therefore thinks that the testator was content with it, all that is. 2 Atk. 298. 8 Atk. 183.

The question then arose, whether it would make any difference, whether the codicil concerned personal or real property, if executed according to the Statute? For it would seem that being so executed, the testator must have had such an intention, and so it was held. 6 T. R. 493. 1 P. W. 165. Burr. 5. 5.

But it then became a question, whether the codicil must be annexed to the will? Does not a man constitute his will by a codicil not annexed, as much as by one annexed to the will? Certainly he does, and this is now the settled rule. Did I take these to be the rules upon which adopted on this subject. There are two cases in which on this hard question the C. J. thought differently. 2 Burr. 521. 1 Sen. 489.

A republication does not give validity to the will, but to give a defective will validity, but suppose the codicil was made for that very purpose, it may be a question, whether it would not give it validity. 1 P. W. 97.

There is one simple case establishing the point that a devise made by an infant, and republished after coming to full age is a good will. 1 P. D. 62

## Admission of Parol Evidence in the construction of Wills.

With regard to the admission of parol evidence, there is very little difference between deeds and wills. The rules which obtain in the one will generally apply to the one, as well as the other.

It has been held common law, as a general rule, that no parol declarations of the testator at the time of the making of the will are admissible to explain his intention. This rule refers to the declarations made to the witnesses present and to the convenience as to the particular devises. But the knowing declarations of the testator subsequent to execution and his subsequent declarations have been held, will be admitted to explain an ambiguity in the instrument.

Parol testimony never will be admitted to prove the terms of a contract, which the law requires to be in writing. This rule appears to apply as well as to wills. But nevertheless the terms of such a contract may be proved by deeds, which there is no manner of resistance or constructive implication from there are not within the Statute of Frauds.

Whenever parol testimony is admitted no more evidence will be allowed to be proved except it extends with the will. And if one fact will be allowed to be proved which contradicts the will, "Devise made to 4 children of Jesse Jones & D" who had six. I die was allowed to prove that the 4 were meant.

Ford v. Ford 945.
5 Co. 68.
2 Bom. 98.
5 R.St. 76.
1 Ves. 189.
5 Ath. 210.
878.

Ord. 210

The words of a devise in the will were "I give and devise to the children of E. and K". It was attempted to introduce parol testimony to show that the name of children were here intended to be designated, but this was not allowed, for such proof would not stand well with the rule.

If it is possible to give a construction to the words of a will the Cts are bound to give it; and if that is impossible or exceedingly, the will must fail.

But when the ambiguity does not arise on the face of the will, but from some fact aliunde, parol proof may be introduced to explain it. 1 Ms. 679

A gave 500£ to "the Charity School in Trent" There were two Charity Schools; parol testimony was admitted to show which was meant.

But suppose a devise was "to one of J. S.'s children" then it was held that the ambiguity appeared on the will, and could not be explained by parol.

When a devise was to M. and there were two of that name parol evidence was admitted to show who was meant.

The general rule is that the Cts cannot amplify and also is recorded where the will leaves it altogether doubtful on whom a devise was to M. 2 Ms. 940

But when a testator devises "to his children" he means, to A a moiety, to B, 2 children, and the survivor

not being named, was totally unprovided for. Can
could parol testimony be admitted to show that there
was such a child? The Ct proceeded on the ground
that all his children were contemplated, and admitted
evidence to show that there was another child. This
stood well with the will.

8 Co. 155.
5 Co. 88
2 Ph. Ev. 197.

If the ambiguity in a will is not patent, but ap-
parent on reading the will, can it be explained
by parol? The rule is that if the intention cannot
be collected by the Ct, the will must fail.

2 Burleigh 500

If this ambiguity arises from the use of a word
of equivocal import, parol evidence may be in-
duced to explain it. The other general rule applies to
an ambiguity in statutes &c.

2 Ray. 216.

There are cases where a wrong description has been
made use of in which parol evidence in wills, though
not in deeds, may be introduced to explain the ambigu-
ity: as when a man devised property to a person
by a wrong name, which he had given him.

2 Ath. 4.
1 Ath. 10.

Where in one case the devisee forgot the name
of the devisee, tho' his own son, whose name was
William, and he had called him Charles, his son "now
in the service of the Duke of Savoy" and this recollec-
tion was allowed to be supplied with out the had a son William.

2 Ray. 218

This latitude however is said not to be allowed in
devises.

A devise was written in Latin (and it seems the
word heres is used, and in the translation some word to ex-

admission of Parol Evidence, in the construction of a devise, not a chattel, in common parlance) the words appended in the devise, and parol testimony would not be shut out if it was used.

The circumstances of a man's family may be proper to explain a will, which under a particular situation of the family may mean one thing, and under a different situation, another. As, if a devise is to "I and his children". To know what estate, I was to have, it becomes important to ascertain whether I have children or not. For in the one case, I would take a fee-simple estate with his children, and in the other, an estate tail.

The circumstances of a man's property may also alter entirely the construction of a will. Thus if a testator is indebted and his only such creditors may be admitted. As where I devise all his real estate to B, on condition of his paying certain legacies; the question was, (at that time) whether it was intended that the real estate should pass, fee tail, or in fee. The legacies being large it would probably operate very hard upon the devisee to pay them, unless for a life estate, in the property. In this case the construction of the words to convey a fee.

There appears to be a settled rule, that the circumstances of an estate may be proved to shew the intention of the testator; provided it be not used to contradict the words of the devise.

6 Co. 7

admission of extrinsic evidence in construction of wills.

Suppose there is no ambiguity apparent in of the devise if construed according to an ordinary construction of the words, it would make the devisor and the devise ridiculous. It was decided in a case of this sort that the technical construction should be departed from, against the opinion of L^d Kenyon, who said he would resist the decision, *pugnis et calcibus*. The case was this: A devised to B, "the house called the Bell-tavern" in which B had already an estate tail. And the question was whether A gave B an estate for life only, or an estate in fee? The court determined that it was ridiculous to suppose that only an estate for life was intended to be given.

1 Salk 235
Pow D. 509
2 L^d Ra. 831
1 Br. 8L. Ca
1 Br. P.C. 108
4th

A woman devised 100 £ stock in annuities to A, 100 £ stock in annuities to B & C & to D. The C^t construed this to mean stock enough to raise 100 £ in interest. The woman had but 200 £ stock in annuities, what then could she mean? She had given away apparently 100 £ in stock annuities to each of three and made provision for the residue. It was decided that the court, from the state of her property, meant only to give 100 £ to each of three, and such stock enough to raise 100 £ interest. This case was carried to the house of Lords, and there affirmed. The first counsel in the kingdom were engaged in it, and the opinions of all the judges were taken.

1 Br. C.C. 472

A person may make his will by his agent if the will are all fixed, according to the general principles of law

Principle of parol evidence in construing devises

the debt is released. But if there are debts owing by a person, his debts is expected to pay them. Parol testimony was offered to show that the testator intended to release a debt of 3000£ to the executor. But it was holden not to stand well with the will.

A man, in Eng.d owes his friend to pay his debts: it is construed to mean only, if the personal fund is not sufficient. The testator did not mean to aid in his fraud. Parol evidence was offered in a case of this sort to rebut the legal construction and exonerate the personal fund: but it was decided not to stand well with the will.

Co. 2. 240. 1 P.W. 261. Pow. 522.

When a will is made devising debts and legacies to be paid and there is a residuum left, and no legacy is given to the exor, ~~and~~ he takes the residuum. This is the legal operation of the instrument, and parol evidence cannot be admitted to prove a different intention.

2 Bro. 420.

Parol testimony is admissible for the purpose of rebutting an equity. A great part of the business of Ch.r of Equity consists in the enforcing of rights which are implied in equity, and of which Ch.r law takes no notice. This will appear from the case of a mortgage with express terms, where ~~Chancery~~ raises an equity of redemption. Wherein such an equity arises it may be rebutted by parol.

Principle of parol evidence in construction of

Thus suppose A devises land to B for the payment of debts, and after executing the trust there is a surplus in B's hands. B or £14 will receive an equity in favor of the heir to receive this money, though a court of law to be no matter of such a claim.

But this equity may be rebutted by parol proof that the testator intended his personal assets for the heir should save it.

Sand. 524
2 Ven. 253.
2 Ven. 677.
Eld. 79.

To state the rule in other words, parol testimony may be introduced to rectify the legal construction — and for this purpose the declarations of the testator may be proven.

This trust is called in the law of equity a resulting trust. The rule of law is that if a man dies, having made an exec^r and disposed of his property for payment of debts and legacies, without naming any residuary legatee, he is entitled to the residuum. Eld. of Eld^y say, it is true he is entitled to the residuum, unless he has lived a legacy (of value) given him; but in that case, it is clear, say they, the intention was that he should have the residuum, and of course they will decree that it shall be distributed. Can this equity mean be rebutted in the exec^r and the legal construction turned by parol proof that such was the testator's intention.

Thus a man dies, leaving no [illegible] and the heir at law has a right to recover; but this equity may be rebutted by proof that there was no intention that the heir should have it.

Upon it is a rule that the heir of the worldly upon has a right to call upon the exec.rs of his ancestor to account and of the personal fund upon remain after payment of debts; for it is thought to be equitable to take from the fund which has been increased by mortgaging his bond. But still if it can be shown that the testator intentionally preferred and that the heir should take the land, an account, the equity will be rebutted.

2 Ch. Rep. 284. Bro. P. C. 526. Cont.

There are some cases however in which parol testimony has been introduced, when no such necessity exists: as in the case of repeated legacies. The rule is that if the legacy is repeated in the same instrument it is not accumulative but otherwise if in distinct instruments. This being settled I shall see how it is necessary to show that the testator did mean according to the legal construction.

Parol proof may be admitted to show that what is given in discharge, is in performance of a former agreement.

Bro. 420. 2 Bro. 323.

Parol testimony may always be admitted to support a claim of fraud.

These rules which do have power include all the cases with which I am acquainted.

Parol testimony can never be introduced to rebut the legal construction.

Parol testimony is never introduced in any

cases, unless it should well appear the intent.

## Of authorities given to dispose.

A person may in a course course a power upon another, to dispose of his property: and he who is thus empowered is a trustee. This power is commonly given to Executors: and any other person is equally capable.

There is a distinction under that head between a mere naked authority, and an authority coupled with an interest. If it is a naked authority, the power descends to the heir, unless the trust is executed. It is always construed to be a naked authority where the words are "that the executors shall sell."

Cro. El. 502. Cro. Jac. 164. Co. Lit. 113.

If the words, however, are addressed "to the executors to sell" &c. or contained the words "and assigns" &c. then with the trust is held with them. This is a mere distinction that has little importance. The trustee is reasonable to execute the trust in both cases.

When there is a mere naked authority, all the words relating to power of attorney, &c. &c. to their suppose, one of two trustees of this sort, says the other cannot sell; for they took the authority not as executors but as appointees. But if it is given determined, if three executors are appointed and one of them dies he would will be entitled his a sale by the survivors. So when a man gives a power to dispose some in land and one died, the other could not execute it.

Co. El. 26

Words are usually inserted "to the use" and an express trust 1 Ch. R. 324.
raised out of the land, provide that the trust may be executed.

It is a principle established in Eq. that whoever has such a power and accepts of it is compellable to act and cannot afterwards refuse. 1 Ves. 304.

Where the trustee refuses to accept the trust, Eq. will transfer for its execution.

Where there is an authority given coupled with an interest, the appointee is in the same case with the donee executed the trust.

## Statute of Uses

The English Statute of Uses had been adopted in some of the states: the most of them, however, it had not.

Before the statute (which was merely) the contrivance of uses was invented for the purpose of introducing a mode of alienation. But the statute when executed the use coupled with the com. law is a power preventing uses.

And in those states where the statute of uses has not been adopted, the cestui que use, is not the legal owner of the estate: he only has the beneficial interest.

Now happens in real life, still, trust-estates are created for the truth is there are many things, which there was one, upon. A of Chancery Lane effected A gives an estate to B, for the use of C: Lane the statute operates. But if A gives an estate to B for the use

of C, for the use of D. Here it is clear, that the fact, though it executed the use in C, could not 2 Ld Raym. 872 operate to execute it in D: so that many by any Rum. 79. 167. devise one fact, the intent of the devisor is satisfied.

No inconvenience can arise under the administration of a Court of Chancery, from the introduction of trusts: and in our time, the power of creating them may be very important.

## How may a devise become inoperative?

A devise which has been duly executed may become inoperative 1st by a revocation.

2. By uncertainty appearing in the will, or that it is not susceptible of a construction: as where a will was to "the right heirs of my mother and father, mingled together." & where a devise was "to the proved or the best person in C." The will was in this case void and therefore inoperative.

Yet a devise may become inoperative by reason of uncertainty arising without the will: as where the devise was of Blackacre to A. There the devisee had two farms called Blackacre, and there were no circumstances from which it could be discovered which farm he intended.

If the will is offered to the jury, as this that it could be regarded as a copy upon the evidence the original will and account of quo ordinat it will be inoperative. [illegible] is plain with a doubt that the devisee could not be-

How may a devise become inoperative?

1st. By the testator's express act, or the devisee taking a fee.

2d. Where an estate is devised to "A and his heirs male forever," and the estate is entailed by the law, words of limitation are not used, the law adds to the fee, and the devise shall take effect as a fee simple. I think this decision consistent with the devisor's intention. The general rule seems deference and attention to the words of the testator "and his heirs" are used to enable the devisee to take an estate tail; and it was accidental that they implied.

A question has also been before the Court of Appeals on the devise of a fee, and the gift of the fee or estate was engrafted.

It is now a rule of the law of Md. that a testator's words shall be construed into fee simple.

The attempt has been made to devise an estate for life from expectation to another; but this has been decided to be a fee simple.

4 A devise is inoperative if it gave to the devisee just what he would have taken, at law.

5 A devise may become inoperative in the mode of the devise. The medium, in this respect, is the same in conveyances, as in wills. It is not, as stated, that what is in form a vested interest, than it may be converted into a contingent. A fee simple is indefeasible, if it be properly granted, and properties consistent with the fee.

## How may a Devise become inoperative?

6 Whenever it is manifest that the testator has made in his life time what he intended to have done this, for testamentary in his life time is an ademption of the legacy. As when one gave 850£ to his son as a provision for him & 2 him in his will; and received from his father, and not long after, beside and the 850£ for the purchase of a commission in the army.

7. Devises under by operation of law, become inoperative when the land is taken for the payment of their debts, which are a lien on the land. The whole of the estate of a deceased person in Ireland, liable to the claims of creditors.

## Who are incapable of devising?

The statute Wm. & Mary uses the words "any person" as a precise of those to whom the power of devising is given. An alarm was immediately excited, thought a dangerous one, on the supposition that persons incapable of devising personal property, as Com. Law, were, by this, allowed to devise real property. This, however, was an entire misapprehension. The Stat. of Wm. & Mary, however, excludes the persons who are incapable, as infants, idiots, lunatics, and persons of unsound memory.

It is a subject of the consideration of the Ld. or Judges, to determine who are of sound & disposing mind to make a will. No precise rule is, or can be laid down. It is commonly said, however, that if a man is capable of understanding his ordinary affairs he is capable of making a

Who are incapable of testating.

It is ex tempore sufficient to set aside wills, for this cause. Edmund Counsel in Court, here said that women in some [illegible] might have been by a sudden accident, not to question the sanity of a will.

If any kind of Nurse has been made use of, (and constant tending of a sick man will amount to this) the will, is always set aside.

But if it appear afterwards, that the surviving recovery, even still withstood of the will, it will not, on this account, be void.

[illegible] a great question whether a [illegible] woman can devise. This has become a very intricate question in every part of the Country, where there is no Tab. establishing them. This subject is particularly considered under the title of Barren and Feme. In some of the States, there is a [illegible] barring not all those who by Stat. Hen. 8th are disabled, except feme covert, with the addition the words "and all other legally incapable," which gives rise to the question whether a Com. law feme covert could devise? Could a married woman even devise personal property? It was considered in Cons. that she could not.

The history of the Minor before the Norman Conquest, would take us to Cons. [illegible] the [illegible] devise, and that both devise, [illegible] the [illegible] sick [illegible]

[illegible] subject will [illegible] in the case of Fitzher v Braithwaite Dyer R. 1 Ram H. 307 111. 101. 4 Bl. 73. Brad 60. Lutw. 173. 5 H. 6. pl. and 7 H. 6 39. 6. Bro. Cov. 27. 34. 5 Co. Co. 27. 37. 2 Ven. 90. 1 Ro. 911 2 Ven. 75. 2 Ven. 343. 3 Atk. 39. 3 Atk. 334 Prec. 215 1 Sk. 126

Com. v. Jane Covert. Case at Com. Law.

2 Str. 910.
1 Bla. 257.
2 Ram. 253.
2 Ld. 27.
218.
Ram. 346.
Ald. 92
Stal. 26. 608.

in which the question came up, Lord Ch. J. Pratt said in which a wife stood to be a married woman was bound. He was of the opinion it is true she had no husband living.

He finds it held in 2 Ld. Raym. that a married woman cannot remain single. "That is recorded in the world sufficiently here." He also cites a case about that time, a decree of the husband's property in the wife with her consent was bad. Hence it was said to be inferred that she could not consent without his consent. But he if it must be searched, was a decree of his property? Is there any case where there has been a decision respecting the power over the own personal property?

It was formerly declared by the husband to assume his wife was a chose in possession with personal property. Lord Ch. Mansfield thus. Two eminent civilians of that time say that she could, "and that it has often been so on abominable opinions."

An argument of another nature, is to be drawn from Lord Ch. Mansfield. A married woman was often allowed to devise his property with her consent. Lord Ch. Mansfield decided, she took the restitutionability power in his estate; and it occurs of that with his consent was good if he mentioned his made devise void. Nor is that the inference in our mind said and person property is taken good as to the husband.

But I think this question has in a manner been established. Round our Lower Court. The [illegible]

CASE AGAINST CORPORATIONS REVISED at Common Law.

It does not seem necessary for former owners to have separate property and the same always been entitled to recover it. What can they be regarded some of the inconvenience, or equal inequalities of times some of certainly such proceeds are the principle that such securities are given for [illegible] to be acquainted in [illegible].

Suppose a case where a man passes to his wife in trust and personal property to a large amount, and is deceased the wife, and it was believed that the receipt of the personal property was paid long ago to the wife; that being prevented by express by the [illegible] will.

Suppose a married man in Texas, a slave contentment with certain property [illegible] — and his husband committed to marriage [illegible] all his right of [illegible] and agreed to give her in large sums expense. The common law [illegible] the estate with and his minors and the [illegible] that the [illegible] could take it, but no [illegible] was [illegible] by the.

If this construction is true that a married woman can account her property it will follow that the man receive money [illegible] and [illegible] which are not [illegible] to be [illegible] according the [illegible]. If there is an incapacity [illegible] prevent the [illegible] to recover [illegible] [illegible] [illegible]. [illegible] [illegible] in the [illegible] been determined that [illegible]. [illegible] [illegible] [illegible] [illegible] [illegible]

Can a married woman devise at Com. Law?

No incident of the husband would be affected by the devise of real estate; on the contrary it would be affected by it and it could be avoided only in the court.

It is objected that the husband and wife are one person; and their case can be no exception. The husband could not devise to the wife. But every body knows that you can transmit property, from one time.

Can a married woman do any act without her husband? It can execute a power of attorney — receive a pecuniary legacy, sue alone, with her husband, recover her real estate. But of what use is her separate existence if she is nobody. Since coverture of her separate existence is not joined the convenience is good enough, he assented to it. So that the argument that she is incapable is false.

If a married woman has an "will" of this kind and the testatrix died not to be married, and then married. Is an action for conversion of the will state the conversion to be committed during coverture?

The second objection is that however that it is said for the wife the devise could not take effect in the lifetime of the husband since it will be without coercion. But at a time this can be shown to be a mere assertion then certainly it should not operate. It is too much, viz. that she has not the power of conveying her real property by deed. It is a wisdom and prudence in our Statutes that have added against it the requirement of the consent of husband.

Tenants in tail devise at Common Law.

Besides if the husband does compell the wife to make a will of her choice, she will perhaps sometimes surprise him in one of her ones.

He said that on his death bed she is in his power. At any rate this is an argument against death bed wills. The husband in such case is in the power of the wife, when she is well, and he on his death bed.

But if say they, she can devise he not prejudice from the marital right, why can't she convey, without his consent? Reason: his consent would make it an estate to commence in futuro.

But this is not it done by way of encumbrance? This is a good argument, if it cannot be answered: but I remember some not be answd, unless it is done at the same time, that the fee tail estate is complete: which could not be the case, since the husband's consent commences from the day of the marriage, or acquisition of the estate.

But in Inst. are that enables us to convey a freehold to commence in futuro.

This question first came before the Court of Common Pleas about 27 years ago when it was decided in the affirmative by 3 Judges, that fee tail could not devise. This decision was reversed in the Supreme Ct. with some alteration of opinion, tho' much that they afterwards expressed a new doubt with his accustomed zeal. Thus the decision was acquiesced for more than 25 years, tho' some continuing to devise as formerly. Lately a

[illegible]

The question was again brought before the House, and it was unanimously decided that the decision of the Speaker was correct and ought to be considered as law. Upon this decision a vote of thanks was taken to the Speaker and then adjourned. The House then adjourned to meet the following morning, and so on every third day.

[illegible] Friday 1805 day.

Much progress had been settled under the law as it was supposed to be, on the principles of fair-dealing, and, on all inconvenience, and embarrassment in the tribes to build their abodes, was anticipated the settlement of the Indians. A bill was introduced into the Legislature, by [illegible] with a friendly intimation of the convenience, emphatically recommended to our consideration, the adoption of this decision. The [illegible] of the act should be happy approved [illegible] and supposed to be [illegible] the reason. [illegible] however, [illegible] the new [illegible] without [illegible] the [illegible] of the [illegible].

## Who may be devisees?

Almost any person is qualified to be a devisee. [illegible] the devise, it is [illegible] the devise may indeed be waived at the pleasure of the devisee.

Property which is devised (i.e. real property) vests immediately on the death of the devisor, in the devisee. It is not so with personal property: that vests in the executor.

Coverture is no disqualification for a devisee. However a devise may be defeated by the refusal of the husband to accept it. But he cannot refuse a devise to his wife to commence in fee: for he has no interest, on a life the right of refusal depends.

It was, once a question whether a husband could devise to his wife. But it has long been settled that he may. Whenever a wife has capacity to take real property, she is entitled to the husband. There is nothing in the nature of the thing to prevent the husband from conveying by deed to his wife: if there was, the disability now made use of, would be a fraud upon the law. Such conveyances are now made through the intervention of trustees, or by the operation of Statutes. There is no reason why the wife may not devise in the same manner, to the husband. The Equity courts have sometimes given a form of [illegible] which operates in a way at least equivalent to the pre-emption clause that is in a deed of gift.

Who may be devisees?

Prem. 26. Illegitimate in manner. But an office found the land over to the king. Have in Comm. Per Statute comp. "N. illegitimate share," &c.

Illegitimate children never be devisees, if they have acquired a name by reputation. All the authorities on the subject depending on the maxim that a natural child "follows mother," are idle. No description can recall an illegitimate child unless he long possessed a name by reputation. Suppose a man has three illegitimate children, and devises "to his three children," it has been holden that the illegitimates could take, though these illegitimate children were afterwards born.

1 Atk. 410

The uncertainty as to which person shall take the property is no objection to a devise: for a devise may be made to commence in future: thus when he devises to his executor who should first demand it. Norton it was holden good.

Prem. 152 & 428

There has been a great controversy and much conflicting learning and doubts, on the subject of devises to persons not in esse. It was claimed that a devise could not be limited to a person unborn, unless it was limited per verba de future. But it is now settled to prevail be law, in which the construction would not be that it was the testator intention, that the estate should vest when the person came into and was before. So that the devisees [illegible] in the [illegible] of [illegible], [illegible] and [illegible]

## Who may be devisees?

A devise either is made to a person in some one capacity, by which he is our identified; or to "heirs of P." the construction of the instrument must [illegible] the meaning of the devisor.

Vesey 24
Doe 717
731

Where our devisor to his "relations" the P.P. have distributed according to the Stat. of distributions:

Both upon it technical words, the rule seems the that the technical force shall be [illegible]

Ld Ranelagh 203.
Pleadt 234.
972.
2 Ranelagh 71.
Pleadt 34.

An unexpressed intention is therewith. Thus the word "heir" is not generally taken to be a word of purchase but of limitation.

Ex. a devise to the heirs of the body of the testator.

But whenever we are uncertainly addressed to construe a word of purchase the technical meaning is rejected: as a devise to a person "and his heirs" when he has already a daughter. So a devise to the "heirs of P." he having a son living who is his apparent heir must be taken as a word of purchase.

In many respects this still seems to be an settled rule of construction as to this word. I shall consider the prerogatives of people.

## Executory Devise.

The nature of the estate cannot regularly be determined from its name. It may be a [illegible] [illegible] whether executory devises are not [illegible] on a [illegible] of a [illegible] [illegible] Think they do.

Dyer [illegible]
Ld Mansfield
Mr Hart

An executory devise on estate must be [illegible] to

commence in future. A limitation is said to be executory devise because never in a will, of course. If it is such a limitation, as would be a remainder if limited in a deed, it will still be a remainder though limited in a devise.

Executory Devises have originated from an indulgence shown to the last wills of persons supposed to be in extremis.

Every conveyance of a future estate which should not be good in a deed is an executory devise, whether good or not, as such, is to be afterwards determined.

No estate in remainder will be good unless supported by some particular estate, in whole, or in part, the remainder can rest.

A contingent remainder cannot be limited to take effect after an estate less than a freehold — for the fee tail must be somewhere.

In a deed, a freehold cannot be limited on a fee: but in a will, the only of executory devise, a possibility may be limited as a substitution for another, on a certain contingency. Thus a limitation to A and his heirs, but if A dies before 21 years of age, then to B and his heirs, is void in a deed, but good by way of executory devise.

But it is not in our power to create a remainder in a deed for years, after a fee or fee tail or a life estate in an expectation of one's creation from any long, [illegible]

[illegible] is [illegible] for the rule. But this [illegible] not operate, as to wills, and therefore [illegible] a limitation in a will takes effect by way of Executory devise.

These are the three important cases of Executory Devises.

A remainder is an estate limited to take effect after another estate has determined, i.e. it is then to take effect in possession though it is a present estate. It must be limited at the same time that the contingent estate is created. This is required by the old rule that livery of seisin is necessary, which is made to the contingent tenant. It is not necessary that the remainder should vest immediately in the remainder man, provided it vests during the continuance of the contingent estate or eventually. And it determines.

An executory Devise is an estate created by will, to be enjoyed at some future period, and which vests in the contingent estate to support it. This mode of limiting estates to commence in futuro originated in conformity with the Law.

If a remote expectancy attaches then the remainders is that estate will be void in its origin.

But the period within which, both a remainder and executory devise, are to take effect must not be so remote as to tend to a perpetuity. The rule first required, that it should be to take effect so soon as life or lives in being. But

18 Mod. 423 Fearne

Br. Ca. 573.

the time has since been extended to a life or lives in being and 21 years after, so that the remainder may vest in a person not in existence at the date of the devise, which is a consequence the rule has been extended to 21 years and 9 months, allowing for the time of gestation, when the child was conceived about the time of his ancestor's death.

Cro Eli 478

2 Mo 177

The third difference mentioned between executory devises and contingent remainders is, that an estate in remainder may be limited in the former after an estate for life, in a term for years. It would seem from, that in this manner a man by creating successive life estates, might control the estate through the whole of a long term, or of a thousand years. But the common rule for preventing perpetuities, appears to this case as to the other, except that in this case, it has not been extended quite so far, as in the other, for here, it is found, all the secondary remainders vested, and consuming at the same time.

The statute 29 Car 2 makes remainders and executory devises on the same footing by declaring that all kinds of estates may be given by deed or will to any person in esse or their immediate offspring.

Suppose an estate should be given to a person and the heirs of his body without issue remainder over in fee, is a good remainder? This has been a great question. Salgin without issue, gave the remainder over in fee

Wms 226
Cro El 478
Cro Car 551
2 Mo 177
5 Mo 17
Dyer 30

[illegible] of [illegible] at [illegible] recently [illegible]. And [illegible] was decided that such a [illegible] was [illegible]. But the feelings of men revolted at this decision, and, from that period, the S.C. have been easily induced upon every circumstance, to take the same ground of the rule. Never had occasion to draw the line in this manner until we came here. It was [illegible] organized in County. It happening to be brought up from a common sense County, it was tried alone. Rule was reversed in Charleston. And so Random case.

[illegible]

Williams v

See a printed opinion, Prinsep v. the Prince.

Import of the word "heirs" "heirs of the body" &c

The general rule is that these words are used to denote any particular person to be the [illegible] of a devise or bequest, or a grant. Neither does [illegible] in the character of heir, but merely in the person of him who is named in the instrument who takes in fee or tail. They are words descriptive of the quantity of the estate.

p. Co. 93. The rule laid down in Shelley's case is this: that in any instrument if a freehold is limited to one ancestor for life, and the inheritance to his heirs, either mediately or immediately, the first taker, takes the whole estate, which will be a freehold, or a fee tail according to the terms of the original limitation. Where such an limitation is made once then it is nothing more in the case it is agreed on all sides that the rule shall prevail. But how, however, to give effect to a mere intention, been broken upon in Wrights. But as to Reeds, there is still a question.

It is said in one set of lawyers that an intention should be effected, and every thing should yield to the superior force of technics. While the other as strenuously contended that if there be a [illegible] in the law, they must prevail.

Suppose an estate is given to A for life and to his heirs forever and that A shall take only for life.

Bac. 148 7 Bac. 2574. Now the question is who are meant by the words his heirs is it those who were supposed to be heirs at the time of his death? or some particular person or his heirs apparent? If the former the intention the technical rule must prevail, and the ancestor take the whole estate.

The reasoning of authority in favor of construing the instrument according to the intention rather than the technical force of the expressions is Archer's Case 1 Co. 66 in opinions of Lords Hardwicke and Mansfield, and Sir Joseph Jekyll, and Justice Buller & Lord Baron Smith, all concurred with me in favor of this construction.

Eq. Ca. Abr. 184 Vent. 231. 1 Ray. 315. Ray. 142 cited Doe v. Rigden Ex. El. 315. 2 Ella. 279. 281.

It is agreed on the other side that the intention of the testator shall prevail if consistent with the rules of law. But they assume that if the word heirs is used not to designate any particular person but the heirs general whoever they might be the rule in Fulling's case must prevail: for though the intention of the devisor may be clear that the ancestor shall take only an estate for life yet seeing that it is inconsistent with the rules of law, and therefore cannot be carried into effect the cases which are thus adduced to be law, on the one side and the other are entirely inconclusive. The cases of Wing and Burchell, and Backhouse against Wells are directly opposed to the decision in Archer's Case. The principles of this great question are ably discussed by the Judges of the Court of Kings Bench in the celebrated case of Perrin v Blake, in which it was decided by three judges against one that the devisee took only an estate for life. This decision was reversed in the Exchequer by six judges against two, but one of the former seemed that had the intention been only doubtful clear he would have decided the other way: so that on the real question involved the opinions were really in equal scale.

Vent. 225. 2 Atk. 237. Southern v Pratten. 1 Ver. Cases Bunn. 2 Atk. Burr. 1192. Doe v Burwell. Mar. 415. Burr. 1. 365. 2 Ella. 437. Doe v Davis Doe v Davis

4 Burr. 2579.

[illegible] to be impossible to execution without the aid of the case of Jones and Mayow is to be considered as law then the doctrine would seem to be settled that the intention of the testator is not regarded if the word heir is used as words of limitation in its technical sense, and not as a mere word of persuasion. But a contrary doctrine has been shewn by the Court of King's Bench at this decision, and also at the reversal of that decision in the case of Pierce v. Blake.

1 P.W. 545. 129. 612. 2 P.W. 349.

In all cases where there is a devise and for the rest thing one estate to one for life, with a remainder over to the construction of the Court of Chancery is that the person to whom the first limitation is given is to be considered as taking only an estate for life. Since the decisions on this question are so contradictory I can conceive of no solid reason why we should introduce in our law the rule which the latter ones seem to establish in Eng.

The meaning of the word heir, when applied to real or personal property.

If personal property is given to one and the heirs of his under, the first taker should have the complete interest of it. But is it an established rule that a life estate given in personal property. The intention ought always to be regarded as far as it is consistent with the rules of law. When then may not the first taker be allowed, where it is apparent that the testator used the word heir as a word of purchase, to take away an estate for life — and the remainder power a remainder to the heirs

Whether in any instance on the part of the contract a devise of removable table to one and his heirs can be considered on principle as vesting the estate in the first devisee upon his decease as a quasi heir apparent who in fact a limitation to him and his heirs is void, omitted to take effect in the ancestor of establishing them in perpetuity. But by an tenure of entailment an entailed estate vests as a simple in the first devisee so that he all transmission of perpetuity is at an end.

3 Ph. 204
2. Atk. 370.
5. Ves. R.S.
2 Eq. 236.
2. Atk. 89.
2. Ph. 290.
2 Atk. 710.

## Of the Mode in Nemo est heres viventis.

When an estate is given to a man and his heirs the words mean the heirs the term heirs and words to show the perpetuity of interest taken in the devise of Thomas A devises an estate to Bane his heirs and Bane before A. the devise is lapsed for nemo est heres to it given to the heirs of B and B is living when the devise is to operate — viz. Brett v Ripson. Blows.

But if the description is such as to make it clear that the testator meant some person to be the person to take, this intention shall be received as if the devise be "to the heir of B — B heir is now living" or "heirs now living." Wherever it is proven that the heirs parent was intended to shall take the estate notwithstanding is ancestor is living in case of a devise to the ancestor and his heirs who "sufficiently would then be in a position to take by purchase on the contingency of their ancestor dying before the testator.

## Title by Record. by Mr. Gantz.

In word purchase includes every mode of getting an estate, except by descent.

The usual method of acquiring a title to an estate is by alienation, i.e. by purchase in its more limited sense. 2 Bl. C. 157

The word "alienation" comprehends every mode of creating a title, by which estates are voluntarily resigned by one, and accepted by another, i.e. every transfer of property by a person of the sacred Sovereignty, exclusive and independent of the state, though this are not modes of alienation. Purchase is a genus of which alienation is a species.

The legal conveyances of the alienation of real property, are called in the law, common assurances. Of these, a deed is one, as also is a Record. 2 Bl. 294 Fines are called assurances because by them an estate is assured to the owner. 4 Co. 9

The species of common assurances are four 1. Deed, or matters in fact. 2. Matters of record: these are judicial assurances. 3. Assurances founded on special customs: of these are now none. 4. Records. Bl. 294-305.

A Deed is a writing sealed and delivered. A deed not delivered, may exist in the same form, as afterwards, but it has not the effect of a deed, until delivering. Co. 171. 35 d. Co. 10. 2 Bl. 295.

## Title by Deed.

The making of a deed is the most solemn act that an individual can perform, in the disposition of his property: it differs, in this respect, from an act of the party, and of the law.

Bac. 484
2. Bl. 295

Hence, from this solemnity every deed is said to be established by his own deed. By this is meant, that no one shall be permitted to deny or prove any thing in contradiction of his deed. This rule however presupposes a competency to make a deed.

2 Wm. 208
2 Bl. 295

Persons legally incapable of making deeds may not only make a document contradictory to them, but may deny them altogether, for the instrument made it no deed. Thus if A makes a lease to B on lands in which he has no interest, he is estopped by the covenants of his deed from afterwards denying that he had an interest at the time.

Ah. 296
5 R. 438
441
1 Ld Ray. 729
2 Ld Ray. 1048
1550.
3 B.R. 371

But, if in the matter of estoppel, instead of being a deed, a fresh is only relied upon in evidence, it is not conclusive; though it is good evidence, and usually satisfactory. I suppose the reason of the rule to be, that matter of estoppel is sacred and an award only invited on a fresh.

9 Co. 6
305

Another rule here is estopped by the covenants of his seal not a quit-claim deed or release of no [illegible] to [illegible] covenant important that the upon had title, at the time.

Co. 296
2 Ld. 265
3 B.R. 370

When a lease is made by indenture, the lease is considered as a deed or conveyance for [illegible] the lessee's title, or a deed of [illegible] Co. Litt. 171 a. Dyer 76. 3 Bac. Ab. 146. 2 Ed. 737 there is considered as the act of both parties, since both execute it. But the rule is otherwise as to a deed poll which is the act of the grantor only.

This section is extended, as it seems, from Co. Litt. 77 a. construed in favour of the grantee to prevent the injury by deed poll from destroying the lessee's title. The same rule has continued down to the present time in regard to the [illegible] 1 T. R. 760 n. [illegible] the lease of the [illegible] the title of the mortgagee.

A deed executed by one of the contracting parties only, is a deed poll, or single deed, as contra-distinguished from a deed of indenture, which is executed by all the parties. 2 Bl. 295. Litt. § 371 a.

When each party of a deed is executed by one party only, it is said to be interchangeably executed, and then the common form is "we have interchangeably set our hands &c". This is wholly useless except in indentures. When both parties sign each part, the indenture is rather here an interchangeably executed though the form is often retained.

When the parts of an indenture are interchangeably executed that which is executed by the [illegible]

## Requisites of Deeds.

executor, is called the original; and that executed by the grantee the counterpart.

4 Bacon 12. 2 Bl. 296. But when both parts are executed by both, they are both originals.

Proc. 2 L. 116. A counterpart alone has been holden in equity

4 Bac. 12. Ed. 455. to be sufficient evidence of the existence of an original, to enable that court to compel a specific performance.

## Requisites of Deeds.

1. There must be parties able to contract for the

2 Bl. 296. Co. L. 35. subject and a thing or subject-matter to be conveyed.

When the whole interest or right in any chattel

Coth. 76. 4 Bac. 12. is to be granted all who have any interest at all in it must join. Also their interests cannot vary.

All those who are intended to take any immediate interest under the deed, must, it is said, be parties. This rule is not quite correctly expressed. It should stand thus: All those who are intended to take any other interest than a remainder

Hob. 313 Co. L. 231 a. 4 Br. 14. 426. should be parties. Remaindermen are not parties; and when the remainder is vested he takes an immediate interest. The reason why a remainderman need not be a party, is that the interest of the particular tenant and the remainder, constitute but one estate, and therefore seisin given to the particular tenant is a seisin given to the remainder-man.

[illegible] Co. Litt. 214. 2. Bl. 290.

[illegible] 2. Bl. 290.

[illegible] Co. Litt. 214. 390. 2. Bl. 290.

[illegible] 1 Rob. 100. 422. 7 Co. 221.

[illegible] Co. Litt. 55. 1 Co. 55.

[illegible] 2 Bl. 5. 446.

[illegible] 2 Bl. 290. 1 Co. 100.

Parties to Deeds

The rule is the same when one is in possession of the land as owner, claiming under the better title. It has been correctly determined in Tenn. that the statute does not prevent a sale by the State, itself, though another is wrongfully in possession.

Nor does the statute extend to a sale by an executor or administrator, under the order of a C.P. of probate. The reason for this seems to be that C.P. 1. The exec. or administrator is bound to sell, and a B. in ali. is to the sentence of a C.P. 2. Besides he cannot be sued to be dispossessed. The same rule extends to Guardians when sell the lands of their wards in pursuance of a decree of a C.P. or Court.

To a tenant collateral to the owner, may sell the land on which the tenant is seized, though the owner is dispossessed. For they are by an act of law.

When a mortgagee is in possession this does not prevent the mortgagor from selling his equity. Success, it has been determined in Tenn. that when the mortgagee acquired the title of the mortgagor, and when no agreement is to the contrary, the mortgagee could sell the premises, he may pa- 1800.

2 Rand. 499. ass. an absolute to some third person. But he would be too much in the power of the mortgagor who would be surprised by such a transaction.

Infants are under some disqualifications, which
excuse some of their acts, and some even
will make their conduct be called "lawful delay".

Idiots cause irritation on certain and capabili-
ty ties, of exercising sense. Men are and severe
totally incapable. In the contrary they con-
sist would their acts excuse as in other cases,
but cannot be allowed to justify themselves
for their acts as in other cases
they are seen in the light. Yet men had the
power to use what the steel edge is seen.
But it is the power of the health man.

There is another reason a friend that a man
cannot be punished criminally. This may be that
it can never be done exceptionally. In
a man just with regard to which there must
not be habits or accumulation. But the
rule seems to be well established.

Fr. 1104.
Ex. B. 398.
Ind. 125.
4 Co. 123.
Hawk. 46.
Bac. 267.
Rent. 1. P. 2. 202.

In India an defect of the rule is seen.
In such cases accused is acted, convicted of the fact
of the act or knowledge. In committing a
a felonious act on the person. This appears
the death of the person or knowledge. This act
is not the person committed. This act
was done under his control, by reason of his
or insanity.

Bac. 1. 2.
1 Mis. 305.
2 Ill. 47.
Hawk. 45.
2 Hum. 412.
674.

Hawk. 21.
Bac. 20.
Hawk. 45.

If any act is made from his state of
mind, or health cannot avoid his action as

29

## Parties to Deeds

4 Co. 124. for ex: a remainderman cannot avail the
8 Co. 43.
1 Com. 45. deed of an insane or lunatic, who had a par-
ticular estate under his grant [illegible]. In gen-
eral where it is only voidable, only the party or
his representatives, can avail themselves.

If an idiot make a conveyance by fine
4 Co. 124 or recovery, neither he or his representatives,
Cro. El. 187 can be permitted to aver any thing against
Perk. § 24.
12 Co. 123. it: but they are absolutely bound by it.

The rule that an idiot cannot avoid his deed
1 Bur 90. [illegible]
in the different [illegible] and [illegible].

If on the other hand a person non com-
pos mentis purchases an estate he may upon re-
covering his understanding agree to it and
thus make it absolute and binding on his
2 Bl. C. 292. representatives. But if he dies without recover-
ing his understanding or without agreeing to the
purchase his representatives may after his
death avoid it.

The person conveying to an idiot or lunatic
cannot however, on his recovery avoid the pur-
chase. The privilege belongs to the non compos and
cannot be taken advantage of by the other.

With regard to the capacity of a feme covert
2 Bl. 20. [illegible] see the title of Baron & Feme.
The husband however [illegible]
[illegible]

## Who may be parties to deeds?

If one is compelled to make a deed by duress he may confirm or avoid it after the duress is removed. The rule is the same with respect to a purchase. 5 Co.

If a deed is made by several persons some are capable of conveying and others incapable, it may operate as the deed of those only who are capable. The rule is the same with respect to grants to several some of whom are capable, and others not. Perk. tit. Deed 81-2. 4 Co. 129. Perk. p. 36. 4 T.R. 472. 1 H. Bl. 64.

## Who may be Grantees?

By the common law all persons in general, may take by deed; as femes covert, infants, idiots, lunatics &c. In all these cases however the purchases are voidable. The consent to a purchase, is always presumed till the contrary appears, as till the incapacity is removed. With regard to a conveyance, the rule is different. The assent of a grantor after the disability removed is not presumed unless it is expressly given. 3 Co. 2. a. 3 [illegible] 4 Co. 22.

An alien may also at common law become a purchaser of real estate, but he cannot hold it; it is seized by the Crown, on the office found. [illegible] Co. Litt. 2. 4 Co. 32. 7 T.R. 701. An alien friend may take a lease of a house for the convenience of merchandize. 1 [illegible] 278.

By the Stat. in Conn. it is provided that no alien

## Who may be Grantees?

2 J. C. 189. 1 Ch. 279

can either purchase or hold land without special license from the General Assembly. It was seen therefore that a grant to an alien would have been void at law. This doctrine however contained an exception in favor of British subjects who owned lands before the Revolution and also seemed to include children the rights secured to them by the treaty with Louis XVI.

Licenses are usually granted to foreigners when applied for, by the general Assembly. The prohibition does not extend to those who are naturalized under the laws of the U.S.

1 Mc 479. 16 J. 27. 2 Mc 256.

By certain Exp. Act. alienations in Mortmain are in some cases prohibited, and in other penalties authorized. The Court, then in view such statutes.

Ch. 6. 433.

It has been held that all lands granted to any Ecclesiastical or Charitable uses, shall forever remain to the uses to which they were conveyed. Such lands are made unalienable. This doctrine has been evaded by very long leases, or sales in trust, and as it has been abolished in Eng. [illegible]

## Consideration of Deeds.

The present rule of the English law is that every deed must be founded on lawful and valuable consideration. Before the statute of uses however no consideration was necessary to be expressed in a deed. The validity of the instrument implied one and estopped the grantor from denying that there was one. So it had practically none was necessary in point of fact.

2 Bl. 296.
Plow. 308.
Co. Lit. 24.

But when the time of uses a deed without consideration is used to convey to the use of the grantor must be limited to a trust person.

2 Bl. 297.
Co. Lit. 23 a.
Sugden 90.

A makes a conveyance to B, without any consideration expressed, for the use of himself for life, and the remainder to B. Now the remainder is void for B has the legal title and the equitable interest results back to A, the grantor in equity. And since the Statute that has executed the use a deed without consideration is considered in the operative as a bargain.

2 Bl. 298-
299.
Plow. 308.

For if A had paid the equitable in him, should open the use as an equitable interest. So that now a deed without any consideration has no operation at all.

Deeds however have in either the rule has any application to other deeds, to other deeds, such as bargain and sale which are founded on a Statute operation and always a valuable consideration.

Shep. Touch.
221
Co. Lit. 270 a.
Cro. Eliz. 85
Dyer
2 Bl. 338
Co. Lit. 270

# Consideration of Deeds.

[illegible]
Cap. 4.
2 Bl. 9.2.
An [illegible] is a deed [illegible] whether founded upon consideration or not [illegible] to the use of the [illegible]

It seems questionable whether in this State, a deed without consideration, [illegible] the doctrine of uses, in which are [illegible] of consideration were in Eng.d [illegible] been recognized in Conn.t [illegible] [illegible] [illegible] to the rules relating to penal bonds & [illegible] bills.

But vid. Kirb. where it is recognized

Considerations [illegible] known to the English law are of two kinds: good and valuable.

1. A good consideration is [illegible] founded in the friendship, or natural affection, subsisting between parents and children, brothers and sisters &c. It has never been extended [illegible] that any relation more distant than cousins, [illegible] [illegible] is suffic.t to make a good consideration, except in conveyances to the heir at law.

4 Cr. 25
2 [illegible]
Pow. P. 129

3 Co. 83
1 Pow. 361
1 Fonbl. 337
2. A valuable consideration is one which is founded on some pecuniary satisfaction.

Marriage has always been considered as a valuable consideration.

A consideration either valuable or good, [illegible]

[illegible] art. 59. [illegible]

[illegible] Root. 479.
[illegible] Pars 6. 340
[illegible] 2 Pb. 2 [illegible]
[illegible] Pars. 494.
[illegible] 7. Co. 40.

[illegible] 2 Ventris 119
[illegible] 2 Mod. 324.

[illegible] 2 Bac. Ab. 59.

[illegible] 1 Co. 76.
[illegible] 7 Co. 27.
[illegible] 5 Co. 26.
[illegible] 2 Co. 15.
[illegible] 5 Co. 5. 94.

[illegible] 1 Co. 76.
[illegible] 2 Co. 76.
[illegible] 2 Co. 76.

and it seems from the authorities above, also it is evident that if the deed includes a certain consideration, or the true consideration must be proved aliunde.

It appears in a deed expressing no consideration, that the conveyance is to the grantee alone, not to other persons relative, the deed ought to be read consistently from the relation in which the parties stand: for it is a general rule that what appears from necessary implication must be understood.

But in such a case, if a pecuniary consideration is expressed in the deed, no other can be inquired into the force of the "[illegible] consideration" of the deed, it cannot be raised to the amount his [illegible] consideration of £100 &c. that deed is not a good deed: for courts will not [illegible] deed ways founded on [illegible] and [illegible] consideration.

The acknowledgment in a deed of the receipt of a consideration is not conclusive against the [illegible] thereof: though the acknowledgment of a consideration is some [illegible] evidence of the existence of a consideration. [illegible] this [illegible] [illegible] [illegible].

5. The deed should be written or printed and it is said on parchment or paper.

But it may be written in any language or character.

Cro. 220
2. B. & Ald. 97.

Seals, written or not, necessary, even in the smallest case of contracts. But, in the other particulars and, first, no interest in land can be conveyed without writing for a longer term than three years.

2 Ch. 713
Pot. L. 240-
1 Roc. 72.

Deed must be written, upon stamped paper.

For if one seal and subscribe a mark, taken to be an authorized act, it is not a deed if some other person at the deed; the mark alone is given in. Write and to be by an agent. It is void.

Shepp. L. 54
Mark. 110.
4. Co. 26.

4. The subject matter of a deed must be legally set forth. But it is not necessary that all the necessary parts should appear in the deed, unless presented and followed.

Bac. 225.
4. Co. 32.

The formal or sealed part of a deed are either of which the first is called the premises, or recitals, the last containing the name of the parties, and the consideration, explain be — these in deed are usually called the habendum.

Ab. 295

The omission of the name of the grantee in the premises, does not vitiate the deed, if the name is in the habendum, and a wrong name in the former, may be treated as surplusage in such case.

Shep. 75
Co. L. 7
3 Bac. 115

3d

## Description of the parties &c.

[illegible] And it has been also determined that where the name of the grantor was omitted in the operative part of the grant, but the consideration was expressed to be paid to him that the deed was good. [illegible] & Bruce 4.4.

And if a wrong Christian name is given to the grantee yet if he is clearly identified by the description, the grant to him will be good.

[illegible] 4 Bro. 94 Because when a misdescription will ever vitiate a deed it arises from the uncertainty which results from it.

1 P. W. 65. Lutw. 8[illegible]. [illegible] 40. And in such a case extrinsic evidence will not be admitted if there be no ambiguity.

[illegible] 35. But in general a grant to one by his description, as inhabitants only, is void from uncertainty.

A name acquired by reputation is a sufficient description of a person.

[illegible] 28 [illegible] 35. A person may be described without giving his name and yet take under the deed as in case of a conveyance to the eldest son &c. The word heir has no meaning in such a case but as word of description.

The habendum and tenendum [illegible]

[illegible] 40 [illegible] 2[illegible] [illegible]

[illegible] 470 [illegible] 258 [illegible]

and to have been holden, that a warranty to A. Cro. E. 475.
was his own "A. to pass to him and the heirs Roll. 9
of his body; the warranty ought to be taken and construed with
a possibility of issue, and vice versa. 8. Co. 154.
The point of time when the warranty is made, Co. L. 384. a.
tho' the warranty is well settled to be so. 103.
Perk. §§ 88. 8.
4. Co. 54.

The generality of the warranty is restrained
by the particularity of the declaration; but when Saund. 9.
the declaration is taken to represent to the warranty, it is said to the extent of the representation. Prep. Truth. 88.
For in words, the rule is that the point of time Plow. 158.
inconsistent clause shall prevail. 2. Co. 28.
8. Co. 86.
J. Vern. 50.
Hayd. in Co. L. 299. a.
will, the rule is directly the reverse.

The declaration is performed when the 4 Co. 9.
the Bond by which the estate was holden. 47
It seems never to be of no use.

So there succeeds the renouncement, or putting Plowd. 13.
the terms of a warranty, on which the grant is made.

The most usually part of a warranty is the condition. Of these I have already treated.

The next clause in a warranty is the covenant by which the grantor and his heirs warrant the estate to the grantee. When a warranty is recorded, if the grantee is evicted, 2. B. 300.
the grantee is bound to give to him lands of equal value. The grantee under the warranty in the grantee, or rather his remedy on the warranty.

Warranty.

Bac. Ab. Cov. B. 4 Mod. 11. 2. Bl. 304.

[illegible] warranties are now [illegible] superseded by covenants.

The covenant, substituted for the warranty, are agreements by which either of the parties stipulates something to the other. Thus it is usual for the grantor to covenant that he has right to convey, and that the grantee shall quietly enjoy. The grantee on the other hand may covenant to pay rent &c. &c. These may be indefinite various. The usual covenants on part of the grantor are two — 1st that the grantor is well seised, and has a right to convey. This we call the covenant of seisin. 2. The grantor covenants to warrant the title of the grantee against all mankind. This is called the covenant of warranty.

Bac. Ab. Covt. B. 4 Mod. 11.

The principal difference between a covenant and a warranty is this — that the latter binds the grantor, and in the same way his heirs to a person other than in case of eviction: but does not bind his personal representatives.

Co. Lit. 384. 1 Freem. 511. Bac. Ab. Cov. B.

A covenant on the other hand is a deed, the grantee only to the covenanter in question, and binds his personal representatives, but not his heirs [illegible]

4 Co. 49. 50. 56. 1 Atk. 11. [illegible]

If the [illegible] is [illegible] on such [illegible] and [illegible] that [illegible] the [illegible] is not known or has [illegible] though the land should pass [illegible] of the grantee [illegible] mentioned. [illegible] 2 Mass. 331. 2 Rich. 224. 2 — 224. 1 Ohio 235.

The rule is the same when a [illegible] of an [illegible] refers to some other instrument for the description of the land. 2 Rodgers.

When the distance or length of line does not correspond with the boundaries or monument, the latter will govern.

Where upon evidence there appears to be an uncertainty as to the monument, the length of line may be taken into consideration, and if the monument is altogether uncertain — the length of line must be known. This was decided in Litchfield County about 30 years and a half since. Dr. R.B. Bolles v. Stell.

The monument or length of line will both govern, rather than the quantity. But if the description is by quantity only, the monument is liable in case of a surplus or deficiency. Dr. 135

For the purpose of ascertaining a conveyance [illegible] intended, it is [illegible] that [illegible] of the quantity, the words "more or less" are words due now usually introduced in conveyances when metes and bounds are mentioned, as well as in those where they are not

Conclusion of a deed, [illegible]

The most formal part of a deed is the conclusion which [illegible] the execution and date.

Cbit. Bill 43. Co. L. 6 a. 47 H. 157. 5 Co. 23.

The date is in strictness no part of the deed itself — it adds nothing: it at most [illegible] nothing. It is merely a circumstance of the time of its execution — [illegible], dates were not intended in deeds. A deed is indeed [illegible] operative, as [illegible] a date [illegible] a date is only prima facie evidence of the time of its execution, which may be contradicted by parol.

Co. L. 46. Dyer. 25. Bath. 462. 4 Co. 94.

The most requisite to a deed is the sealing of it, if sensible: otherwise it is not [illegible]. If the party wishing to know the contents of the deed is himself able to read, he cannot avail himself of a refusal of the other party to read it when asserted.

2 Ro. 14. 2 Co. 3. 9. 11 Co. 27. 4 Co. 27.

If the deed is read falsely to a party, it will be [illegible] as to the [illegible] read falsely and the deed may be void, as to him who received — so that he if he release, [illegible] [illegible] author it. If the attorney [illegible] the deed falsely read to him by collusion he cannot avoid it, for he is then a party to the fraud. [illegible] [illegible] [illegible] of his own wrong.

2 Co. 9. Bath. 271. 4 Co. 27. 2 Bl. 904.

## Sealing of Bonds

[illegible]

[illegible] Ind. 105-6
Shep. 26.
Shep. 60

[illegible] is not necessary to the instrument as a deed. But it is necessary only in those cases which are within the Statute of Frauds.

It seems some what questionable whether, in Indiana, sealing is necessary in any case. We are of opinion that any written instrument containing any express covenant or agreement, is a deed.

Formerly every seal was distinctive, and then served the same purpose as signing. But a seal does not now seem to identify the party, and seems therefore to be of no [illegible].

In some states sealing is essential to every deed of conveyance, not only for the [illegible] and security, but by a [illegible] statute relating to conveyances, which [illegible] the [illegible] of sealing.

Ind. Cod.

One person may affix another's name to an instrument for him, but the seal

## Execution of Deeds, by attorney.

2 Bos. & P. 142
Str. 705.
9. Co. 76
Hob. 118.
6. T. R. 177.

must be executed in the name of the principal. The common mode of execution is "A B by C D his attorney."

Co. Litt. 52 a
Str. 705.
9. Co. 75.
1. B. R. 181.

If the deed is not executed in the name of the principal it will not bind the principal but the attorney, himself.

An attorney cannot bind his principal by deed, without an authority by deed: for as certain solemnities are necessary to bind

Co. Litt. 52
7. T. R. 207
Com. Dig.
6. 1. 5.
4. T. R. 313.

a person by deed he cannot bind himself by means of an attorney, unless the authority required allows the power, is attended with the same solemnities. This rule, however, seems to contribute the execution of a deed in the principal's absence: for it has been holden that if

4. T. R. 313
Elliot. Pick. 218.
1. Ruff. 385.

he executes a deed for himself and another, in the presence ~~of~~, and by the direction of the other, it will be binding on both. Indeed, ~~and~~ the rule must be considered from the equity of the case rather. For also, a person physically incapable of affixing a seal could not be capable of binding himself by deed.

The general rule holds also as between partners in trade. When there is a copartnership established, each has a right to act for the whole so far as their joint concern is involved. But if one expedition would bind the other by seal he must be empowered by deed.

7. T. R. 207
4. T. R. 313.

Execution of Deeds. Delivery

If several are named as executors and one
under seal the instrument it is his sole act. Co. Lit. 35. Ven. 71.

For the purpose of proving a publication to a Delivery
deed this must be a delivery. 2. Bl. 306.

And whatever may be the seal it takes of
fect from the delivery. Then, if a deed is 2. Bl. 307. Co. Lit. 35 a.
made by a person capable of contracting and Prest. 72.
delivered after he has revoked and gone,
it will bind him.

If a third person affixes the seal, and the Cok. 5. 19.
party himself delivers it, he adopts the seal 2. Bl. 307.
as his own.

Such it is indispensable that the act Cok. 5.
should appear delivery. For a deed takes of
fect from delivery and as delivered. Prest. 58.

It has been determined that the act of Co. Lit. 36 a.
delivery, without words is valid. 2. Co. 107

So, on the other hand, a delivery may be Com. Dig. Ab.
words only, without any act at the same time. Fait. A. 3.
as when the grantor said "there is your deed, Bac. 2. 10. a.
take it," and the grantee did take it then Co. 4. 28.
was held to be a good delivery. Prest. 55.

But if after an instrument is sealed the
grantee takes it without a actual delivery or Com. Dig.
without the grantors express declaration to Fait. A. 3.
such, there is no delivery, except it is ascer- Com. Dig.
tained that the deed was left when it was Fait. A.
with intent that the grantee should take it.

Delivery of Deeds.

Presumption of delivery arises from the practice perhaps in of the [illegible] of the subject of the deed.

To prove the acknowledgment is considered as presumptive evidence of a delivery.

A deed may be delivered either to the party in person or to any one empowered by him to receive it, or to a stranger to the use and in behalf of the party.

Shep. 57-8. Perk. § 137. 4 Co. 28-9.

With regard to the effect of a delivery under certain circumstances, there are a number of distinctions to be observed, which are important.

A deed cannot be delivered to two effect more than once, i.e. only one delivery can be effective. If the first delivery has an effect the second will be void. Thus &c.

Shep. 60 Perk. § 64. 4 Co. 28-9.

If the first delivery was void, and a second is afterwards made, the second can have no effect as a delivery, but may be of confirmation of the first.

But if the first delivery is void, (as in a fine) a second delivery is good, as by fine after correction determined.)

Shep. 60 Perk. § 64 Cro. Jac. 204 2 Mac. 1805.

Hence also if a deed once delivered, be cancelled afterwards, as by tearing of seal &c a second seal and delivery will make it good from the time of the second.

Shep. 60.

But on the other hand if an infant or one under duress delivers a deed and after full age or restoration to liberty, makes a second delivery, this second delivery is void, for the first being only voidable remains good till avoided. This formerly struck me as a case of difficulty. But the second delivery, doubtless operates by way of confirmation of the first. An infant can [illegible] at his election avoid [illegible] at his full age by any act [illegible] to a [illegible]. [illegible] Shep. Touch. 60.

## Conditional delivery

Delivery may be either absolute or conditional. Shep. 58

If a deed is delivered to a stranger, to be delivered over to the grantee upon the performance of some condition or the happening of some contingency the first ~~condition~~ was conditional. Co. Lit. 36 a. 4. Cruise. 24

In the nature of the case, some reasons say a delivery must not be made to the party, as an Escrow: for the delivery of a deed from the nature of the transaction is always to be presumed [illegible]. But the current of authorities is certainly against the doctrine. The reasons assigned are that there could in such case be no second delivery — & that [illegible] conditions cannot be set up to control an written deed; — & that a delivery without any words, is to the absolute title. Shep. 59. Co. Lit. 8. 5[illegible] 884. 9. Co. 137. 4. Mass. 8[illegible] Co. Lit. 36. a. note 6. [illegible] 218. [illegible] Cruise. Tit. 32 [illegible] 3. 1 Ld. Raym. [illegible] contra Cro. El. 835. Moore. 677. [illegible] Ex. & Ashurst.

In the [illegible]

[illegible]

conditional deliv.

Delivery of Deeds

It is not the deed of the grantor, until the condition be performed on the continuance of which the deed is delivered over in the power with which it is entrusted before the consideration performed, until it is not the grantor's act.

Because it can only become his deed by a delivery by himself or by some one authorised by him to make the delivery.

According to this doctrine of an escrow, a bond or covenant or indenture to be sealed and delivered to the grantee, is an escrow. This is not an unusual mode of submitting to arbitration. An arbitration bond is a sort of this clause to the amount found in the award.

It seems to be settled, that if a grantor says to the grantee, "I deliver this as my deed to be delivered over to the grantee upon some condition" the delivery is absolute even though the condition is never performed. But if it is manifested that the intention of the grantor is conditional in the mind of the grantee, it is a conditional.

Shep. 59
Perk. §
4 Co. 30.
J. Co. 137 a. note
Com. Dig. Fait. A3
2 Prof. P. R. 499

When upon performance of the condition the deed is delivered over to the grantee this delivery is absolute and the instrument from that time takes effect as a deed.

J. Co. 35
Shep. 59.

It is said that on performance of the condition by the grantee, if the action lay or could have

to action on the deed the title will accrue in the grantee by relation. Because it is said the fourth limit indicate, is sufficiently manifested by the performance. But such a think could be done in the extent in which it is laid down, for it is manifestly correct in order of necessity when by reason of some other unknown disability a recorded delivery would be of no avail: as when countess be has interest. For recital may exist in time there is no intervening disability in the grantor, the title vests from the time of the recorded delivery.

Cooper, 76. 3 Co. 35 b.

Subject Rumsey Wright v. Goodtitle. Per Jemmat rule does not apply to recital.

The true rule then is this: In case of a conveyance where there is no disability, and the time of the commencement of the conveyance, the deed takes effect and vests at the time of the first delivery, or not, as the case may require, and as may be valid. When there was a disability at the time of the first delivery, the title does not, in strictness, have relation to that.

Cooper, 76. 3 Co. 35 b.

But necessity contemplated in the rule of Cooper's case, and exists, except in cases where a time or a proper delivery of a deed could not be specified: this is not a matter be operative the grantee might compel the corporation to deliver over the deed.

Co. Lit. 44 a. Cooper, 76. 3 Co. 35 a. Stile. 423.

In the case of a bond sealed the corporation could be merely a sealed have no power to return over the deed to deed lin. Rights are vested by a conveyance.

Co. Litt. 36. a. Co. Litt. 447 3 Co. 35. b

If one delivers a deed, as his act and deed, and says, that when the condition is performed, the deed takes effect by relation, to the first delivery; in the meane time it is a mere nullity.

Tay. 7 Co. 23. a.

And in case of this kind, it makes no difference whether the deed is delivered over, or not, after the condition has been performed.

In explaining the doctrine which was taken in the first case, it was considered as a mere nullity. Whenever a second delivery should have the effect of performance of the condition, consummate the first delivery: but where the second should be operative, it must be the act of the party.

If the person delivering a writing to be delivered over as his deed, on his own death, the deed will take effect by relation from the time of the first delivery, whether delivered a second time, or not. For the death of a person who has conferred a power by deed, revokes that power. It is that creates the interest.

Co. Litt. 183 1 Rol. Abr. 183.

Doctrine of Relation. 7 Rep.

If a person seized in fee, delivers a deed to a third person, to be delivered over, upon the payment of money, and dies, the condition is performed, the deed will take effect upon performance, by relation to the first. For at the time of performance, it is impossible for delivery, but it must be held to be from the time.

Co. Litt. 447 Tay. 7 Co. 23.

Delivery of Deeds.

Consideration.

Before one of second marriage makes a deed and confers the power on a third person to make livery of seisin, on the execution of the power, and then becomes insane, the rule is the same.

Ib. not law see 2. Rol. Abr. 9. Co. L. 52. Lit. f. 66. 1. Bac. Authority 8.

But all the other hands of one make a power of attorney to another, to execute a deed, and the deed is executed by the one in the name of the other, and livery of seisin is made, and then the deed is delivered, the title moves accordingly.

Co. L. 66. 1. Bac. Authority 8. Perk. f. 85. Co. L. 52. Plowd. 207. See what incants not come thus to?

This would be to notice the expression used in a commendatory, and on a condition and come with the death of the grantor. But in the latter case the deed is to be taken as a deed altogether after the death of the grantor. But in the former case the deed has a relation by fiction, to the original deed, made in the grantor's life.

If the application of the doctrine of relation would defeat the end, when first delivered in escrow, the title must be dated from the second delivery.

Co. L. 36. Co. L. 185. Co. L. 147.

This will happen, second grants to a third person who was unknown at the time of the first grant. If it be done on a second covenant, and delivered to a stranger, and delivered to a stranger, and delivered before the condition happens, the deed will not take effect at all. The rule is the same as to an infant.

Co. L. 35. Co. a. Co. f. 67. Co. B. 185

J.B. 3 Jo. 36. — When a man takes upon the second delivery
Hob. 125
Dyer 73. his relation to the first, it still is a taking upon
an act to avoid collateral acts. This rule concurrent,
merely, to this: that the second delivery operates
retroactively, only to vest the title, and not for
any other purpose. Nor if a power is delivered over,
in such circumstances to give it a retroactive
operation, still a lien between the first and
second delivery, even not this change of the bond.

I conceive that this retroactive operation,
can never affect a third person by contract,
on the same principle, as in the last case. It
3 Co. 36.
29.
would be monstrous to make the person a
trespasser before the happening of the con-
dition, and liable for all the rents, and profits: A
Hobart 7.
Yo. 2. 150.
3 Co. 29. b.
Com. Bailm. 2
A. 5.
lessee of land must act in very and make
that tortious, which was originally lawful.

When a chose is delivered to a stranger, to be de-
2d. notes 20.
livered over to the promisee, then being no condi-
tion in the case the promisee is presumed to
attend to that delivery till the contrary appears.
This is the case of an absolute delivery.

If a chose is delivered, without any to a stranger to
be delivered over, and the promisee, or lessee, re-
5 Co. 119
3 Co. 26 b.
Bod. plac.
Acc.
Cro. El. 54.
Hob. 60.
fuses to accept it, he can never afterwards re-
quire it: the bailee is then finally officio. And
if he delivers it, the promisee may plead never
bailed.

## Attestation, Recording &c of Deeds.

The last part of a deed is the attestation of it, 2 Bl. 307.
i.e. the execution of it in presence of witnesses. For the [illegible] of the deed, however, delivery is necessary. The attestation is the act of the witnesses.

This is not, at common law, a requisite or essential part of a deed. It is only evidence of its authenticity. 4 Cr. 31.

Formerly the attesting witnesses used not to sign their names, but merely attended at the execution of the deed. Indeed, at common law, they may then be dispensed with altogether. Co. L. 7. 78.

By the Stat. of Conn. however, all grants of lands, tenements &c must be attested by two witnesses, who are to subscribe their names or marks. (And by a late Stat. all leases, for a longer term than one year must be attested in the same manner.*) They must also, by our Stat. be acknowledged before a magistrate or justice of the peace, or they will not be completed. There is a provision in our Stat. with regard to enlarging contracts &c. for which I refer to the Stat. Stat. C. 653. Stat. C. 653. Stat. C. 653.

* or they will bind only the lessor and his heirs.

Farther. Stat. no sale, or deed of mortgage of houses, or lands shall be good in law, except against the grantor or his heirs, unless it is recorded in the office of the town clerk where the lands lie. The Stat. the town clerk is to note the day on which he received the deed, and the record shall bear the same date from which time the title, as against third persons, is in general complete. Swift 71. 1 Stat. 6

Recording of deeds, in Conn.

An unrecorded deed gives no title, even as against a Tort feasor
2. Conn. R.
French v. Gray

It follows then, that an deliver a deed for charges of the same land, the conveyance recorded and acknowledged by the town Clk, will hold the land against even a prior deed.

This rule does not hold in favor of a subsequent creditor, if the prior creditor has used due diligence in delivering his deed to the town Clk for recording within a reasonable time.

Rord. 500. 388.
2 Rord. 239.

Deed is executed to day, of property lying at a town miles distant. Half an hour after it is delivered at that town, attaches, if within a reasonable time, the purchaser procures his to be recorded, he will hold in preference to the creditor.

Fn.

What is a reasonable time? is I apprehend, when the facts are given, a question of law.

If a prior deed is left with the town Clk, with direction not to record it at present, a subsequent recording of it, shall not have relation to the time of executing it, so as to defeat an intermediate purchaser, whose deed is recorded: unless the first was prevented from being recorded, by the subsequent grantee, or by the original grantor.

Marsh.

Wilcox v. Bratton.
1. Rord. 499-500.
2. Rord. 239.

The rule is the same if the delay was owing to the negligence of the grantee.

And it is said to have been determined that a subsequent deed shall operate to exclude a prior one, the recording of which has been unreasonably delayed.

Recording of deeds &c, in Equity.

so, even tho' the subsequent purchaser had actual notice. In Law, I presume this is correct. But still, as he purchased with that con-
tract before it was the object of the Stat. to
prevent, the prior vendee, in Equity, will prevail.
This is the rule in the Registering Counties in
England.

Rod. 61. Pl.
1 Ch. 309.
1 Freeth. 23.
Comp. 712.
1 Bury. 66.
1 Eq. Ca. 75
2 Atk. 275.
3 P. W. 646.
Ambl. 746.

But it may be asked why should not Law and Equity make the same construction of a statute? There is no diversity in the construction: both agree that the legal title passes to the first purchaser; but a court of Equity treat him as a trustee for the second.

If the Clerk has made his entry, on a deed, it is his duty to record it, and if he refuses it he ought without recording it, even at the request of the party, he is liable to any one who may be injured by it.

Willett v. Blanchard.
2 Rand. 85.

It is the Clerk's duty to keep the records in file, till recorded, open to the inspection of all who wish to examine the records of the County: and if he conceals it he is liable to any one who is injured by the concealment.

## How may a Deed be avoided?

If the instrument wants any of the essential requisites, which have been mentioned it will be void as a deed, though it may be good in Equity as an agreement or covenant.

2 Bl. 304.

## How may a Deed be made void?

2 Bl. 304. 1 Co 2, 7

A deed may be made void, by [illegible] or post facto as by a material alteration [illegible] or other material alteration.

4 Co 26 Cok. 55

But here, if made before the delivery will not invalidate the deed if an immaterial alteration is made at the time of the execution. Deeds, as it [illegible], are often altered, without any memorandum.

An alteration made by the grantee, after delivery, destroys the deed, whether the alteration is material or immaterial: Even though the alteration operates against grantee himself, and was made to effect the intention of the parties. This rule is founded in policy — to prevent grantees from tampering with deeds.

11 Co 27. Pach. 1284. 2 Mod 29.

Cro. Eliz. 7.

Though the deed contains several covenants connected, and is altered in one only, the whole is void.

But on the other hand an alteration of a deed does not destroy it, unless it is made in a material point, by the grantee.

2 Mult. 29 Cro Eli. 829.

Cro. Eliz. 10

Hence in all those cases where a deed is declared void by alteration, the party who made it may plead non est factum.

If the deed is destroyed by alteration of a stranger, the grantee may [illegible] his action against the stranger, and recover the whole amount which he has lost by means of the alteration.

6 Co 24. 626

Ans. It is said that in a case of this kind the grantee may in equity compel the grantor to make him a new deed in the same manner as if the deed was lost by accident. Field 61.

2. A deed once complete, may be avoided by breaking off the seal. 1 Co. 27.

Thus if land be in fee simple conveyed in a deed and the seal of owner is broken off the deed is as an nothing as to that.

But when two are severally bounden and the seal of one is broken off, the other is bound solely. 2 Bulst. 280. Geo. Wms. 1 Ves. 282. Cro. El. 145. 570.

3. A deed may be destroyed by being defaced up to be cancelled. 2 Wh.

4. A deed may be destroyed by the subsequent disagreement of those, whose concurrence is necessary to its legal effect, as by the dissent of the husband of a feme covert. 2 Bl. 307. Theg. 58.

5. A deed may be avoided by the wilful act of the party or by Ct of Justice. If a deed has been altered or forged, and a decree is obtained vacating it, the deed becomes void. 1 Ves. 548. 2 Ves. 2. 647. 157.

## Construction of Deeds.

A general rule over received, is construed against the instrument.

Generally they will be construed in order the intention of the parties, as the rules of law will permit. But there are cases in which the strictness of rules will overcome notwithstanding the apparent intention. Co. L. 76. Plow. 134-60 3 Atk. 136.

# Construction of Deeds.

of the word heirs is omitted, in the grant of a fee, yet such a fee either does pass or not, though a contrary intention is manifest.

Now. 154
Dep. 87
5 Co. 28
4 Gr. 416.

When the meaning is apparent, no technical rule will vitiate, or alter the construction of a deed.

The construction should always be given on the whole deed, and not on any part alone, thus rules are to aid in the intention.

Co. 5 288
Dow. 67
Dep. 87
4 Gr. 410.

The construction should be so made, if possible, that every part of the deed may take effect.

When there is an doubt, with regard to the meaning of a deed or words, they are to be taken most strongly against the grantor, or that party whose words they are.

Dem. 30.
Co. L. 299 a
4 Gr. 418.

If however, the words are plainly repugnant, the first in order is to operate, and the latter to be void, unless a sufficient difference can be made from other parts of the deed.

Dep. 92
188.
4 Gr. 417

Thus if words or sentences with their terms contradict one another, it would be void and void; the other not the former is to be preferred.

Co. 5th 125
4 Gr. 418
6 Co. 86
251.

All words repugnant to the general tenor of the deed, and the evident intention of the parties are to be avoided.

When any subject is granted, all the incidents appertaining to the enjoyment of that part with it.

2 Bl. 96.
Dep. 87
Co. L. 56

Or where a power is given to do a act, it is also conferred on the person to do every act, incidental to this act.

So the same principle, if a man let the ferriage on land to B, it is impliedly given him a right of entry for the purpose attaching them away. So if one grants to another a mine, the grantee has a right to dig it on the land of the grantor. So also, if one grants the fish in his pond, the grantee may go on the land to take them.

Hence also, the grant of the ferriage or subject carries with it the incidental or necessary. It is true, the words "with the appurtenances" are usually inserted for the purpose, but this is not necessary. Thus a grant of a ferry carries the land.

So under the grant of a house the ways belonging to it will pass; and by the grant of a mill the water necessary to use it.

A material rule, in the construction of deeds is that a deed operative in one form, in which the law it cannot take effect, may operate as a deed in another form, for the purpose of accomplishing the intent of the parties. Thus if one joint tenant releases his co-tenant the deed will operate, and is pleaded as a release. So if a deed is made by a particular tenant to the remainder-man it will operate as a surrender.

Co. Litt. 271 b.

Shep. 87.

Bract. 62

Co. Litt. 121 a. 2 B. & P. 222, 229. 7 East 26. 2 M. & S. 174, 176

Co. Litt. 54 a.

Cro. Jac. 35. 2 Wils. 75. Thel. 45. Com. 549. 3 Lev. 252. 2 Ro. 442.

A condition precedent, it seems, means to one who covenants, the existence of such fact as shall be said to release and it is sufficient as such.

If the terms of a deed are so uncertain, that the intention cannot be discovered, it cannot have no effect at all. As a deed to one of the children of L.L. no having two or more, so if a man grants one of his farms, neither can take by it.

Cro. Jac. 213. 4 Co. 42a.

A deed is void in part, void in other part good. In other cases a deed void in part is void in toto. In deeds the intention of the parties rules the construction.

11 Co. 27b. Plow. 40. 2 Wils. 351. Thel. 4. 1 Rum. 6. 197.

If a deed contains several covenants some of which are good, and others void, the latter only are of no effect, and.

But if it is void, that if any of the covenants are made void by statute law, the whole deed is void. There is no mystery in this case. There is no specific difference between a covenant void at common law, and a covenant void by stat. So far as the terms relate at all it is confined entirely upon the construction of the stat. as when it mentions void, in contradistinction to the common law, on the other hand, does not make the whole void, but only the covenant for the existence.

If two distinct obligations are written on the same paper, and one of them is read truly, and the other not, that which was truly read, will bind the party, and the other not.

Tho' a deed which is read truly in part, and falsely in part, may be good for the part which was truly read, yet if the jurisdiction goes to an entire thing, as an entire sum of money, the deed will not be good for any part.

# Actions for injuries to Minor Real.

The injuries which may be done to Minor real are six: 1. Ejectment, 2. Trespass, 3. Nuisance, 4. Waste, 5. Subtraction, 6. Disturbance. I shall treat in this place only of the two first, and fourth.

Ejectment is an action, by which, a person in possession of land, tenement or hereditament, wrongfully removed or turned out from them, enters at a time, or hence, in a two kinds. Division and Ejectment. The former decides on the right of the freehold, the last to an action of an estate less than a freehold, as of a term for years.

The former remedies on a Division of land, are now disused. A Real action is at this time, an action in Westminster hall, on an action of Ejectment.

The actions which are now to treat are Ejectment and the Common Action of Division.

Ejectment is an action, by which, a lessee for years, upon entry of his term, ousted or put out of the wrong doer, together with damages. The action of Ejectment is never used to recover the freehold.

The action of Division, in Common is an action in which a person ousted of his freehold, recovers it of the wrong doer with damages.

3. Rl. 199, 200.

3. Rl. 199.

Wms. 9. Ed. 17. 3. Rl. 199. 3. Rl. 199. Co. 105.

Treatment, and Disseisin in Comm.

2 Bl. 197 – 8
Co. Lit. 285
Com. 68.

Lui in Trespass, a quod ei deforceat. The Equitable action of Ejectment is of more recent, rather date.

Formerly, indeed, the Lessee, if ejected, was remitted to his Ejectment, or action of Trespass, against the Ejector, and the Lessor was not admitted to intervene, unless he was made a Defendant, there was no remedy by which he could recover either Rent or possession in Equity. And now, the Plaintiff

2 Bl. 198 – 9
2 Bl. 199 – 200
2 Bl. 198 – 9

in Ejectment, in the English Law Courts, is merely the Lessee, through whom the Lessor is bound, in the Judgment.

5 Bl. 201.

This practice was adopted also in Ireland in the reign of Hen. IV.

The Lessee of Disseisin, in Ireland, is entitled to alone, differing from that in England, 1 Bl. 138.

is necessary for the Lessee to commence the Suit. Some cases were established in Ireland, upon the right of the Lessee, and that have required to recover the Land.

2 Bl. 200

The English action of Ejectment is a mere

2 Bm. 207 – 8

the only method now in use of trying the title to land. The only other, then, remained.

The actual possession of land or property, and though nominally an action, is

3 Bl. 204 – 205.

concerned with the possession, title, or the rights of the property in dispute.

The demandant recovered in it, as was usual, and nominal. But the tenant claims in right, and the judgment executed, it is customary for the plaintiff to bring a second action of Trespass quare clausum fregit to recover the intermediate rents and profits. 2 Bac. 21 / 2 Bl. 205 / 3 Bl. 205 / 6 Co. 24 / 2 Bac. 160 / 6 Co. 7.

In real actions, except in Assise, no damages are recovered.

## For what, Ejectment may be maintained.

The action of Ejectment will not recover lands in any thing of which the tenant could not enter, plaintiff recover, and the defendant: for if the tenant recover the whole thing of the action would be abated. 2 Bac. 160 / 5 Co. 5.

In other words the action will not lie for any thing, or which an entry in fact cannot be made.

Land will lie, therefore, in ejectment to recover in advowsons and tithes: or things which lie in grant, and not in livery. Bac. 2 / Th. 54 / Co. 2 / 2 Bac. 160 / 2 Bac. 161

If one is entitled to a term for years in an advowson, he cannot recover the rent, for no freehold lies in grant or livery of it: but if one is entitled to an annuity he cannot maintain Ejectment to recover it: the reason is the same as in case of a tithe of way.

But, on the other hand, the action will lie to recover land held and as a tithe over the ocean of the sea: and it is brought and recover the easement or tithe of way, but the soil. Ej. 181 / 390 / 420 / 2 Bac. 54 / Th. 1004. / 1 Rack 118.

[illegible] 45 [illegible] to the [illegible]

[illegible] v. Rostin 1812. [illegible] the [illegible] that the lower proprietors cannot maintain ejectment to recover land said to be part of a tenement thereon is probable intended to have. Conceive that this decision is unstable on all principle. Since the lower proprietors did not part with the soil, in granting the tenement a right of water over it.

Tr. 1820. Sr. P. 162. 2 H. 197. [illegible] land tho' the soil belongs to another: [illegible] proper on belongs to the proprietor of the [illegible] under the road is reserved.

Ryde 148 Rifl. 167 2 Ld. Ray. [illegible] water course so nominis, for water is continually flowing and a flowing cannot be seized of it. But the [illegible] may [illegible] through a course with water.

P. 195 [illegible]

## Whom may maintain Ejectment?

[illegible]

not the same action, and the action will [illegible] 1. Bl. 177. [illegible]
not lie, unless he had complaint of an entry: the Com.ts [illegible] 13. [illegible] 177.
in this action must be right of possession in him.

The action will not lie, therefore, in cause of the heir of tenant in tail who was ousted in his father's lifetime; for the [illegible] was a discontinuance which deprives the heir of the right of entry. He is driven to his real action.

Because of the lapse of the right of entry, an action [illegible] claimant have been out of possession 20 years Bull 10. 2. Bl. 168. 172.
which removes the right as it is barred by the 3. Bl. 206.
Stat. of limitations. Our Stat. limits Stat. p. 194.
the right of action to 15 years.

By the Eng.h Statute and our own, there are exceptions regarding persons under disabilities, beyond seas &c. 5 [illegible] 502.

In Eng.d the disabled owner of the lands is entitled to 10 years after the disability removed: in Conn.t only 5 years are allowed.

It has been much discussed on the question, whether successive disabilities may be so joined as to keep the title within the exception. 6 East 80. 4 [illegible]
In Eng.d it has been determined that they cannot;
but in Conn.t, in the case of Bush v Bradley, it
has been determined that they may.

new on great deliberation in Olion Wolcott case 1816. J.G.E.

If the statute has once begun to run, no subsequent disability will not save the title. [illegible]

4 Co. 300
6 East 83.

[illegible]

[illegible]

Bac. V. Bag.
Ch. 12.
F. 1.12

[illegible]

[illegible]

Com. 1291.
Esp. N. 453.

[illegible]

Cowp. 219.
Esp. N. 182.

[illegible]

S. Bac. 504.
Ch. 12.
7 T. Rep. 192.

[illegible]

Cro. Car. 19. 20.
Ch. 12.
Esp. N. 717.

[illegible]

[illegible] [illegible] [illegible] [illegible] possession [illegible] [illegible] [illegible] 325.
But [illegible] [illegible] the [illegible] [illegible] [illegible] [illegible] [illegible] 60.
[illegible] the possession [illegible] [illegible] [illegible] [illegible] 112
[illegible] [illegible] [illegible] [illegible] of possession [illegible] 34.
[illegible] have [illegible], in [illegible] for 5 years in
Court will bar the original owner.

This case may present an anomalous [illegible]
[illegible] [illegible] the [illegible] [illegible] [illegible] [illegible]
[illegible] [illegible] [illegible] [illegible] [illegible]
[illegible] who has [illegible] him. It is difficult
in principle to say that he can, yet it would
be extremely inconvenient to deny this right of
action.

The possession which here amounts to a title under the Stat. of limitations must be a possession adverse to the possession of the true owner. Else the possession of the tenant is in law the possession of the true owner. Hence if a mortgagee continues in possession more than 20 years, there is no presumption of abandonment by the mortgagor.
Salk. 423.
1 Show. 21.
Salk. 285.
5 Bur. 2604.
Co. L. 195. a.
3 Bac. 27.

But though the sole possession of one joint ten. or tenant in common [illegible] [illegible] [illegible] the co tenant, yet an adverse possession by him, will bar his co tenant. [illegible] 423.

If therefore one joint ten. or tenant in common endeavors to hold the whole estate by possession he must prove an actual & adverse possession.

5 Bur. 2604. that then a grant may be presumed if an adverse,
[illegible] 185.
2 [illegible] 382. possession is established.

What shall be deemed an adverse posses-
sion in such case is a question of fact to
Cowp. 217.
[illegible] 434 be left to the jury who from great length of
possession may presume an actual grant.

If the party in possession claims under the
[illegible] and the same original title he is [illegible]
possession. Then [illegible] cannot in the
Bul. 103.
[illegible] 385 [illegible] of the [illegible] remaining in possession
T. Rep. 51.
68.
222. [illegible] consistent with title then.

So also, possession by a particular tenant
deemed for the remainderman or reversion-
Cowp. 218 er. For the remainderman had not the right
of possession until the expiration of the par-
ticular tenant's estate.

[illegible] a tenant [illegible] [illegible]
[illegible] 104.
[illegible] 657. [illegible] of actual ous-
[illegible] 435. ter [illegible] may be [illegible] by [illegible]
evidence.

[illegible] 297. The general rule that possession [illegible]
[illegible]
[illegible]

If the action of ejectment is [illegible]
[illegible]
[illegible] 208
[illegible] [illegible]
[illegible] [illegible]
[illegible] [illegible]
[illegible] 1817. [illegible]
[illegible]
[illegible] 450. [illegible]
[illegible]

Comment.—Note on mortgages.

It would seem to be generally, that an entry is necessary to complete the legal title, no other than a constructive entry or mortgagee: but an entry is necessary to give the equitable title, an actual entry is indispensable; as in case of a gift made by a donee of the lands of the donor who has not actual entry, to merit a decree.

Mar. 1897 Bragg 647 1 Bland 319 note. 2 Bland 285 note. Fo. 1086. Bull. 105.

This rule is founded on the following reasons & authorities. In the former case, the title repd to mainteni the action accrues upon the contingency be happened for: and in the latter, it is repelled upon the defendant, which does not arise again a third time.

It is a general rule that he who does not maintain the action, wrongs the party entitled to recover. A mortgagee then, may maintain it not only after, but before the day of payment, for he has the legal title. A merely equitable title will never answer, except the equity is stopped to deny that the plaintiff has the legal title.

Ver. 21 Eq. 4. 485

The assignee of the mortgagee and his assignee may maintain the action, and so may subsequent assignees.

If a mere, simple trust is made a mortgage, the mortgagee cannot avail the law for the other, for he is not legal title. But if the mortgagee is in possession he may maintain the action, if he has entered under

Mary 28.
269
Cox. ni. 755

It is true that it does not seem to be settled that a
[illegible] authority to release his equity
under a mortgage may recover in ejectment
for the money has been paid if it was not paid
Ibid. 2.
2 Ven. 347
2 Ch. Ca. 184
2 Chap. 51
1 Ver. 187
1 Ch. R. 256
at the day. For his estate then becomes absolute.
This is called a satisfied mortgage.

The person who has the legal title may sue
in this action tho' the equitable title is in
another.
9 Co. R. 54
2 P. C. 2. 22
Ibid. 2 Ch. 102
Ibid. 1 Ch. 103
note
The attornment of a tenant after in equity from other occupiers a sovereign
since [illegible].

In some modern cases however, courts of
Ibid. 473
Ibid. 597
have made use of the rule and taken notice
of equitable rights. The principle of all these cases
2 Wms. 22
695
747
1 P. R. 642
735
2 Ch. 195
7 Ch. J. 47
663
Cro. R. 516
Ch. Ch. 334
7 Bar. 27
however is where equity is in a person who has the legal title,
as in case in dower, and of [illegible] mortgagee
[illegible] to plead this case, however [illegible] person
[illegible] other authority, and of [illegible] is [illegible] and
[illegible] courts have done so.

It is a general rule that the right shall accrue
4 Ven. 483
Ib. 10.
Ib. 485
by the strength of his own title and not by the
weakness of the title of another. If one has the legal title
2 Mod. 227
he may recover against the tenant in possession
against the rightful title of a stranger. In a case in dower he seems to
have been considered the mere [illegible] —

But the cest. cannot defeat the action by [illegible] shewing title in a third person, when the lessor's title is derived from the cest. and when the cest. claims under the lessor. In these cases a rule analogous to the law of estoppels applies. So if A. claiming under [illegible] leases to B. and B. cannot, in an action of eject. brought by A. deny the title of A.: for whatever that title is, B. has already availed himself of it and cannot now deny it. There seems to be no [illegible] [illegible] an exception to the rule that the pltf. must recover by his own title — for the deft. is precluded from shewing that he had none. [illegible] 760. 7 [illegible] 45. Bul. N.P. 110. [illegible] part. 222. 7 T.R. 488.

The legatee of a term for years, having a legal title, may maintain this action. The legatee, however, cannot maintain this or any other action without the assent of the executor; for till that is given, the legal title is in him. [illegible] compel the assent is by a suit in the ecclesiastical court. In court[s] the assent of the Exec. is [illegible] [illegible] necessary. [illegible] [illegible] are always sued for in the Court of [illegible] [illegible]. Esp. N.P. 486. Pow. [illegible] 188. 1 P.W. 544.

When a freehold, however, is devised the devisee may recover it immediately without the assent of anyone. Pow. Tr. 90. 93 [illegible] [illegible]

The assignee of a mortgagor may maintain [illegible] [illegible] [illegible] at the time of the [illegible]. Esp. N.P. 457. 2 May. 70.

## Who may maintain Ejectment?

The committee of a lunatic cannot maintain this action to recover his land. The action must be brought in the name of the lunatic; and in fact, the demise which is made is made by the committee under the order of the Court of Chancery for the purpose of protecting the property, as in a manner of possession.

7 Ch. 245
7 Ch. 18
2 Wills 138

The dower of the widow of the lunatic is not, but his conveyance, when taking the action in the name of the dower, or in trust, suing by his conveyance.

Tal. 2. 204

When a man dies, leaving a term for years, which he warrants his action ought to be maintained in his executor or administrator, or in the executrix, if they have assets.

Cro. J. 576
2 Saund. 201
3 B. & P. 439

Power is reserved of an entry of a reversion, and this reversion belongs to his heir. He may, however, in this case, claim as the heir a reversion land devised.

Cro. J. 576
1 Saund. 23
2 Wms. 180
Co. L. 11 b.
B.

It has been determined however in Bennet, that the heir may recover lands of which his ancestor was seised: the reason of this diversity is to be found in the phraseology of the statute, which requires "ancestor" only.

3 Bing. 106

The claim cannot maintain this action, since he cannot hold that — the "ancestor" for a term he is attained to hold, or the

41 R. 300
2 L. 2. 3
4. 129
7 Co. 16

[illegible]

In case parts of the title of the rest of the Commonwealth is abrogated. 22 Engl. Eccl. Rep. 136.

The rule that aliens cannot hold lands does not apply to naturalized foreigners. 6 Ga. 74. 4 Ga. 131.

A lease for years may mention a right, even a remote possibility in the lessor, in the form of a reversion in fee. 3 Wh. 180. 190-1. 1 Ga. 8.

It has been determined, in Conn. that a grant could be in common, joint or entirety. 2 Dr. 73

The grantee of one, will not have the rest. And if one release, the other may possess for his share. This rule is certainly altogether inconsistent in the land, but it is founded on a separate estate, that has been in common, joint or entirety — there is certainly no propriety in joining them — when no unity of right is violated. The rights of tenants in common are reversed.

## Pleading in Ejectment

The declaration should state the plaintiff's title, and as every it must have a subsisting title at the time of the action brought. Pl. 556. 28 Ala. 274. 1 Ala. 155.

The general title will not be sufficient.

But though the plaintiff must state his title as it is, yet he should state the nature of his title truly, he may declare for a larger term than he had.

Ejf. 4. 7.

In laying the plaff's entry, it is not necessary to lay it on any particular day. It is sufficient to state that it was made after his title accrued. In case the proceeding is the reason given. The entry according to the common form of ejectment being altogether fictitious and worthless, and in reality no other fact than such as are traversable need be laid on a certain day.

Cro. Mi. 445.

In Covin, it is not necessary to state that the plaff entered, at all; it is enough to aver that the plaff was at such a time seised, or possessed. A constructive possession is law equivalent to an actual possession, where no other person was in at the time.

The entry must be laid at a time subsequent to the accruing of the plaffs title. Otherwise no wrong is done.

Co. 7. 9 Mod. 16. Cro. Ja. 96.

It is said, the particular time of the entry need not be laid, i.e. that it is not necessary to lay any particular day, of the entry: and that it is sufficient if it appears to have been made after the accrual of the plff. Apprehend this must be laid an good assumpsit. Non est the entry complained of in bar of the

Co. 7. 91. Cro. Mi. 445.

2 Lev. 140. Cro. Ja. 150. 1 Mod. 629. Ro. Ab. 663. 5 Mod. 263. 9 Rep. 23. Bacd. Ab.

Sheriff can never be convicted of that the sheriff can never be convicted of what he is to deliver the possession. In case of covin, the usual proceeding was required, the usual process.

The form of the writ is nearly, as we have seen, a description of the tenement, or messuage in which he had his freehold, the boundaries, and the quantity estimated. The quantity, or bounds, should be more in any practical instance.

In the form of the writ, the boundaries are never given, or attempted to be given, or at most, some one or more of the boundaries is, the quantity is herein, in which it is said some certain quantity, and then usually mentioned.

If the land in question is described in the writ in a more special manner, it must be described in a more specific manner. In this respect there is a material difference, between a general and this, and one which is much to be noticed.

The plaintiff however is not bound to state the exact quantity: he may recover so much as he may prove title to. If he proves what he declared for, he may recover more than he has claimed in his declaration.

In the same manner he may recover for a smaller than he declares for.

Though in fact the writ has described land as being, and must be, he may still recover if it appears, and the jury find the same, that he is entitled to the land, the plaintiff, either in part or more, proved he is entitled to recover.

2 Bl. R. 70.
Bl. 95.
Cowp. 322. 330.
Bul. 100.
Str. 1204.
Salk. 254.
2 Str. 97.
2 Bl. R. 706.
Co. Lit. 10.
3 Bac. 354.
1 Roll. 326.
Com. 250.
Bul. 106.
Wils. 220.
Bul. 10.
2 Bl. 327.
1 Bl. 197.

## Trespass on Ejectment.

The deft. in this action is bound to plead the general issue, unless the act is beyond, under the special circumstances, will permit him to plead specially.

If were, in any instance, decided in Court, that a release of title in newspaper, under a pending action was no bar to an action of ejectment between the parties because this action is of a different nature. Take this case in point to be settled. "upon most equitable" it is true a judgment in this case would not be conclusive upon the hereditament of a subsequent action of ejectment. Indeed, it would not be a bar to a subsequent action of trespass for another act on the same land. Nor would it be a bar to another action of trespass that had been a prior action of trespass, for which the general issue was pleaded and judgment given.

Bart 346. 2. Ev. 175. Take the rule to be this that when, in an action of title, it is held in issue, and found in verdict, no evidence to the contrary of that verdict can in any action be allowed.

## Evidence in Ejectment.

1 Ev. 236 2 B. & P. 749. 4 T. R. 682. This court refused for the plaff. to prove that the deft. has no title, he meant to use that as evidence, he says.

Mod. 90 3 Ld Raym 1500 This counsel then, for the deft. to prove a subsisting title in a third person

## [illegible] in Ejectment.

When an entire [illegible] is [illegible], a recoverable term the lessor may be recovered against him in this action. But it may happen that the plff. [illegible] [illegible] undivided [illegible] [illegible] [illegible] to recover [illegible] the same act appearing the [illegible] having his right, if the lease was an entirety.

3 Co. 64
Cowp. 803. 483.
Esp. Ni. 465.

If the [illegible] is strictly not [illegible] [illegible] the plff can [illegible]; as an alienation in fee by the [illegible] [illegible] [illegible] [illegible] [illegible] [illegible] [illegible].

Dougl. 57
Cowp. 182
Esp. Ni. 464

When the plff [illegible] the [illegible] [illegible] [illegible] [illegible] [illegible] [illegible] [illegible] [illegible]: But it need not be proved precisely as laid.

Cowp. 14
6 E. Rot. 677.
Esp. Ni. 417.

## Verdict & judgment in Ejectment

The plff may recover according to the title he proves though variant from that laid in the declaration. In this respect the verdict and judgment follow the proof, and not the declaration — though they must not be [illegible] to that. If the plff declares for several [illegible] title, and to one of them the judgment will go for that one. And if [illegible] the declaration is good as to one, and ill for the other if the plff can prove his declaration for the good, he may have judgment.

Esp. 447.
490
Cowp. 231
Esp. Ni. 440.
Esp. 490

Though the declaration is for land only a recovery will be had of all the buildings upon it.

Esp. Ni. 491
Co. Lit. 4

# Verdict & Judgment in Ejectment

Salk. 258 If the pltff recover, judgment he has a writ of posse-
2 Wms. 178 sion called a writ of habere facias possessionem
8 Co. 121. 122. On this the Sheriff delivers possession to the pltff,
and turns all others out.

T. Rod. 73 If the pltff say, behaving the said, when he
received this seisin and present his recovery
damages and costs.

This rule is, true, adopted without qualification
Yelv. 184 In Eng. the rule is that the deftt may plead
8 J. R. 484 this fact in bar, if the jude will allow it.
But it is discretionary with him, to allow
or not.

If the term for which the action is brought,
expires pending the suit, the pltff may still
Ste. 130 Co. L. 289 2 J. R. 24 3 Mod. 249 have judgment for his damages and costs.

If after the pltff has been put into possession by
the writ of habere facias possessionem, is again
turned out by Deftt he may have a new writ of
1 Wms. 177 possession on the 1st writ issue an attachment and
2 Bac. 180 the deftt as for contempt. Against a stranger,
a new action of ejectment must in such case be
brought.

In the Eng. action of ejectment if the verdict
4 Mun. 224 is for the deftt the pltff will recover if over, must
Ste. 136 a new trial. There is no need of a new trial for
5 Bac. 288 the judgment is the fact & is no bar to a second suit they
7 Co. 27. 28 may make a new lease & bring the action again

a new cause of ejectment, so that the parties being different, and the cause of action not appearing to be the same, they cannot be identified with those on the former trial.

But if a verdict is for the plaff. on new trial now granted, it is tried in ejectment, or in other actions the verdict to a new action will not find the title in statu quo since, by the execution on the first he will be barred and of his possession. 4 Bur. 2224. 5 Bac. 204. Salk 648. 650. 2 May. 54.

Upon principle it is doubtful, that a new trial could in no case, in the action of ejectment be obtained.

In the practice allowed a new trial in the action of trespass for either party may be obtained on the same grounds as in any other action; for here this is a fresh action, and the first judgment is no conclusive against the parties as a judgment in other actions.

## Mode of recovering the mesne profits.

A verdict for the plaff. having established his title it follows that since the ejectment, the defdt has been a trespasser. Hence, in the action in the nature of trespass, the injury been an actual damage for the defdt's trespass. Therefore damages for his unjust possession. This action is called trespass for the mesne profits — and there pursuits the rule of damages. 2 Inst. 21. Salk 648. Ho. Pl. 182. 2 Bac. 18. 3 Mod. 205.

In this action, the trespass may be tried in the local county with a venire facias and this is

## Nuisance for the mesne profits.

The usual practice is, for the owner to bring an action and the wrongdoer under it [illegible]

Wms. 500 [illegible] stated specially.

1. Roll. (P) 3. Wils. 121 2. Ray. [illegible] If a person has [illegible] a [illegible] and [illegible] a continuando until the restitution of the property.

3. Wils. 121. This action is incident to the [illegible], [illegible] a recovery in the [illegible] in action.

1. Sem. 15. 2. Roll. 14. It is said in [illegible] that the [illegible] may be sued, [illegible] a bill in [illegible] for an account of the profits. But it is [illegible].

3. Wil. 225 3. Wils. 119. The concept of this record [illegible] from the [illegible] in the [illegible] action of [illegible] the damages [illegible] and the [illegible].

Smith 905 2. Roll. 191 It has indeed been holden that the [illegible] may recover his whole damages in [illegible] action? [illegible] But it is said on the other hand that the whole damages cannot be recovered because the action is not laid with a continuando: as in trespass the [illegible] may recover, [illegible] the injury is done [illegible], unless the injury is with a continuando. [illegible] continuando, [illegible] mesne profits [illegible] a continuando. But it seems that the [illegible] not recover for the mesne profits [illegible] a [illegible] after the verdict. [illegible] [illegible] [illegible] [illegible] [illegible]

Trespass for Mesne profits.

mitted, till actually [illegible] and if he has 14
afterwards re-possessed himself.

In trespass there is no doubt, that full damages may, according to our established practice be given to the plff. We allege that the deft. [illegible], ousted the plff, and from that time, has continued in possession, taking the whole rents and profits. It is not usual, however, here to recover the full damages. Our remedy for them is after the ejectment.

The record in the action of Ejectment estops 6 Mod. 222
which the original action, and is conclusive 2 Str. 424
2. Bac. 181.
of the fact between the parties. The deft. in this 3 Wils. [illegible]
second action, is not permitted to deny that, at
the time of the ouster he claimed in the action of 1 Wils. [illegible]
ejectment, he was [illegible] a title superior to that 2 [illegible] 181
3 [illegible] 25
set up in the action of ejectment, and a prior ouster.

But this rule will hold only for a [illegible] for the plff can recover only for the profits accrued since the time and ouster, laid in the action of Ejectment. That record is conclusive as to that. But if 3 Bl. 2.5 / 1 Bul. N.P. 86 / 2 Bac. 8.
he claims profits for a prior trespass, the deft is at liberty to shew title and the record cannot conclude him.

The plff having regained possession that possession has relation to the time of his title's accruing — This entitles him to recover for the mesne profits. Esp. [illegible]

Action of Assp. for Mesne profits.

85.

Bul. 88.

7 T. 455.

[illegible] The defdt may therefore protect himself against a claim for all mesne profits accruing more than 6 years before.

3 Wils. 56

Bac. Ab. Ejectment (K) 2 Saund. 252 n. 1. 2 Saund. 252 n. 1. 2 Saund. 252 n. 1.

This action is, in effect, brought in the nature of an ejectment. Though it may be brought in the name of the nominal plaintiff, and so if the defendant release the action, would be suitable as a contempt.

If one tenant in common, non-suited in

3 Wils. 116. Bac. Ab. Ejectment (K) 2 Saund. 252 n. 1. 2 Sp. 81. 495. 1 Ld. Raym. 323

an action of ejectment, he may maintain this action against the other for the mesne profits. The defdt in this action is indeed afforded to this rule.

2 Hawk. 308.

2 Bac. Abr. 184. 2 Sp. 408

This action is tried with a continuando.

Not so, when used, in proper time.

This, in its decision, appears not little from the clear personal property.

The object of this action, is to recover an injury done by the plaintiff in trespass. For it is doubtful to recover possession. But to recover damages, for acts done in mere access to the field, while in possession, the second action of possession is required.

Such, however, seems the law in most of the States, in this respect, on the same principle that they have done away the common "common pecit stipitem." In some, this rule is modified. Somewhat, if there is no existing possession, it is sufficient to enable the plaintiff to maintain trespass.

This act, which constitutes a trespass, must always be a misbehaviour and not merely a contravention, except, perhaps, in the single instance of an officer failing to return a writ which he has executed on the body of the plaintiff; who may maintain trespass against the sheriff. This, however, is not quite certain. The officer commonly has left by the return, that he took the body of the plaintiff under a writ, and so that it stands upon the footing of a misfeasance.

It is not necessary, in the commencement of a trespass, that the wrong should concur with the injury, or immediately follow it. It may commence in one place and continue, for it is a continuance.

## Trespass for real property.

If a man does that, which he has a right to do in the ordinary pursuit of his business, and an accident happens he is not answerable for it in trespass, if the act was involuntary. So if a man is endeavouring with the use of proper precaution to shoot a bird and kills another man.

Bac. Ab. No mere mistake will constitute an offence. Thus an officer who levies upon the property of a stranger mistaken for that of the debtor, is not excused by the mistake. These rules will include all the cases on this point — a lawful pursuit conducted with due care and without mistake is the only excuse.

Place property is delivered into the hands of another, in whom confidence is placed, and he abuses his trust by a action of trespass, or else he is not liable upon him unless the possession was fraudulently obtained. The fraud destroys the contract, and makes the act a tort, as if it were. In the land case trespass the same would be the remedy, or waste, for a wrongful abuse on lands leased to.

If a person has an adverse science given him by the law he is a trespasser ab initio. Thus in a case in the 'old Parliament Cases' in Coke, where a bailiff, upon them by law of entering a house, in breaking the premises, and was therefore to be treated as a trespasser ab initio.

B. Co. 46.
B. 78. 394
Co. Co. 48.
Co. 57.
J. Mil. 40.

Here is a distinction in cases of trespass, as the possession of persons, and not property.

# Trespass on Real property.

In the former case the [illegible] [illegible] cannot maintain trespass against the reversioner. Though it is the [illegible] trespass, [illegible] [illegible] [illegible] [illegible] [illegible] [illegible] [illegible] [illegible] [illegible] [illegible] [illegible] [illegible] [illegible] [illegible].

If the timber be, or the land's [illegible] by the lessee, or trees are destroyed by a stranger, the lessee is answerable for the permissive waste to the owner of the land. The lessee therefore tho' he has no title in the trees, he must be allowed his action against the wrongdoer, to obtain indemnity, in his liability over to the lessor.

With respect to personal property in almost every conceivable case we know that the bailee has a right of action against a trespasser on that property. But this is not like the case of lands. For here the general owner, i.e. the bailor may also have an action against the wrongdoer. Why is this? The bailee is not, if he has used due care, liable (as tenant for years ut supra) to the bailor. If the bailor sues the wrongdoer the bailee cannot recover the value again. He only has a remedy for the original injury done to him. The reason for the rule that he is entitled at first to an action is to be found in the fact that the bailee is accountable for not having used due precaution to the bailor — and it would be hard that he should be answerable without having [illegible]

But suppose a broker bailee is entrusted with property only, with direction to keep it on his shelf e.g. in a particular manner, and for which he is to receive no reward, and in case no liability he causes an injurious trespass in his own house, a second a wrongdoer. But if there is any possible reason for liability, a bailee in such case might maintain the action.

Pa. 10 "Balmond" 2 Wh. Rep.

If relaking of an outer door by an officer in order to seize goods in such house is a trespass, contrary to the injunction of a statute which takes a letter in the house. But suppose after the doors are broken the officer then levies upon the goods, is property of the writer is that act a trespass, and the execution of the writ void? If we understand the law as laid down in 7 Co. 41 it would seem that the officer has only to pay for the trespass committed by breaking the outer door upon satisfying process and then he is under no fear of the execution of this unauthorized act. It seems to me to be a strange doctrine, allowing the sheriff to commit a trespass at a trifling expense the benefit of a breach of the law. In the course pursued the officer might take a better or more improvised method of a trespass and then the trespass then a very close execution in which would be valid. It appears to me from the case in Croyden that there has been a revolution in sentiment since the decision on this point, in 1610.

Cro. Jac. 1.

De la Maine Case

This was a case where a sheriff on an execution had levied an execution, which was levied on the goods

Sedgwick Vol. 1. 380.

Semainer Case

of the act of the opinion of the breaking into his house. Lord Mansfield said the whole force of his reasoning to prove that the breaking was of an inferior nature, and not an active one. Now if the case of a lease, was considered as true, it would have been unnecessary to enquire that point, since the execution would have been well-levied, though the author was entitled to his action, for the trespass in breaking his door. It appears to me to be an maxim, that "no man can derive any benefit from his own wrong."

Perhaps, being an invasion of the possession, the action can only be brought by one having the possession. It is true, that for the act of trespass the owner may maintain this action for he was in possession at the time of the injury done, but if the trespasser remains in possession the action must revert to another action.

Fee simple ownership is considered as giving the possession when there is no opposing possession. This accounts for the rule, that the action lies for a trespasser even against the trespasser who abandoned his possession, for then the true owner is constructively in possession.

Quere, Qd. Ca. in Coupland on 20th Term Report.

There is a kind of possession which is a mere invasion of possession, that gives no right to maintain the action: as if a person goes into another's house and commits a trespass: this will not enable him to main

## Trespass on real property.

Ther. 546. 956. Trespass against a stranger.

Suppose a man, wrongfully, takes the property of another, under an authority (as an officer) wrongfully describing the property, as a writ of replevin. Trespass does not lie against the officer, as it would if he had himself made the mistake. So it is, in all other cases, when one acts under the authority of the law. Where a man, under color of the law, or authority, is required, or permitted, the officer is not liable in false imprisonment or trespass for the act done, but some liable be made of a property which is in fact reversed.

If the officer makes a mistake, or his act does not in appearance of other men, to take the property of the wrong person. They are all liable as trespassers. And persons their servants, or agents, who do so, should them. They are not bound to know that they were commanding, illegal act, and this authority is from the ordinary course of law.

Ch. 284. 7 Co. 38. Ley. 25. Ther. 555. A man may commit a trespass, not only in his own, but by his servants, his dogs, or his cattle.

For example, if he opens a mans third, without leave, and not be a trespasser, ~~[illegible]~~, or takes his cattle, which have broken in. So to shoot a bullet, a man may enter upon the land of another, as for an other lawful purpose, should a man may enter on the possession of another, without leave, or to kill game or animals ~~[illegible]~~ scattered.

So where one has the right of ingress, egress or regress upon the property of another, and leaves a to all the damage done by him, it is not for the injury itself. There must be some authority in occupying the land in order of their and when damage of property may have a right to bind the entry and when not. A reasonable course must be pursued.

Cl. Rd. 560.

All are principals who are engaged in a trespass. Trespass on real property is supposed to be the entering on the land of another and doing some damage. But even the least damage was sufficient when the rights of ingress and egress were violently usurped to enable the owner to maintain this action against the agent.

Cl. Rd. 557

D'Berard v. Neill, more in violation that an injury occasioned by negligence, but not against the owner, where entry determines the estate at will, unless the owner violates a right of entry by agreement by the tenant.

Co. L. 257

This tenant can commit no waste; for that may not, which would in other tenants amount to a forfeiture, but a trespasser.

There is a question also of some difficulty upon asserting the rights of a licensee, who has recovered in ejectment against the licensor, to recover in an action for the mesne profits in an action of trespass against a stranger who has committed an injury during the process of the

Trespass on real property.

Owner. Have the right to maintain the action against the owner himself, proceeds on the ground that the restoration by the action of action, has a retrospective operation and the owner is considered as having always been.

2 Bos. & P. 554. 11 East. 56.

But the owner, himself, is liable for the whole damages — then why should the owner have his remedy against the stranger who certainly has been liable to the owner, himself, and indeed, still is for the injury done to his reversion. Doing of opinion with Powell that the owner only, should have the action against the stranger.

Bac. Ab. Trespass. Lessee cas.

Lessee, who has a right of action against another for an injury to his reversion, does not lose it by injury done to his reversion.

Tyd. 569.

Lawyer are often perplexed with cases, where damage is done by cattle breaking into the land of their owners neighbor. If they break thro' that part of the adjoining fence, which was to be kept in repair by their owner, he is liable, otherwise not.

Cattle while are commonable, may go at large in the highways, unless there is a law by the corporation against it. In such cases, their owner is only liable for the damage done by them, in breaking through a fence which was good.

But the owner of cattle not commonable as horses, may go at large, he is liable for injuries done by them when suffered to run at large, even when there was no fence.

If a bye-law makes cattle commonable, which were not so before, their owner is not liable to have upon them by them, in the same manner, as though they were not commonable. The only operation of the bye law will be to exempt them from habit. If to be taken up, and impounded.

The trespass to maintain this action must be immediate. 7 H. 6 74

A trespass on a civil injury. Lawrence, concerning in Pri Country, where no Lawe no trespass, is mere void, in a crime, as in Eng. Pri. Action has been sustained at these times, in this country, and never denied. 2 Vol. 55? 5 Co. 91. Cayp. 1. Campbell v. Stokes Cont.

The law considers the breaking of an master close against a person, who have his faith, and fines for injury.

If I for money enter on the lands which is his some, & demand into the condition of the tenure, & see Mr. Lawson committed. Cayp. 20

One man cut down Lunt upon the water lands & another. Pl. says, to is generally agreed, that the fishing of a weyrn of beer is entitled to them. Def. contends he has a right to cut down a tree, for the purpose of getting them.

A man who purchases a piece of land in the midst of another farm, has a right of way to get to it: but if he buys an exemption, as a piece of land in the midst of another farm, he obtains no right of way. There is no implied covenant.

Trespass is often brought for the purpose of trying the title to land. The action is brought especially before the justices of the peace. The defdt puts in a plea of title, and this takes away the jurisdiction of the justice: who is required by statute to take a bond from the defdt that he shall try his title before the higher courts. But the judgment in trespass is not conclusive upon the parties so as to bar an action of a higher nature. The judgment, and verdict, is evidence on the second trial, but not conclusive. It is called presumptive evidence. But, I never knew its use mislead.

The time of bringing this action is limited in most of the States. In cases where the action is not brought to try the title, the plff if he recovers no more than 40/, can recover no more costs, than accompany this; to prevent trifling causes from being brought before courts of high jurisdiction.

The mode of declaring in actions is pretty simple to young practitioners. But he who is acquainted with the principles, will seldom fail of making a good declaration.

In this action, the plff must aver that he is possessed; he must aver that it was possession of land; he must describe the property, — and that the possession was interrupted — by the defdt, trespassing, and arming, into the plff's close. He then must state the manner, the time, &c. &c. This is all. Declaration [illegible] in the words "did arm," or "did [illegible] the peace," [illegible]

In U. States

recover more money?" The latter words were accidentally introduced, because the deft, in an action of trespass, was alike answerable in a fine to the public as in damages to the pltff. The after words "viz & ind" were introduced only to show at what rate the jury were to pay for his wife, which were, indeed, in this action, plain and a claim on the case.

Where in an action by Pattle, the mode of declaring is to state that the "defendant with Lucatte"

By a Stat. in Eng. regarding trespasses on lands, the pltff who recovers, in an action which is not brought to try title, recovers treble damages. Suppose an action is brought, founded on this statute and [illegible], on the trial, appears that the pltff can not recover the treble damages, can he recover at all, on the writ which he has brought? The Ct Lane, correctly, allowed him to recover, as in an action at common law. This principle was decided in a case in Moore. This rule prevails in all cases of this kind.

Moore. "punitive title"

Suppose in an action brought on a statute giving double or treble damages, the jury are of opinion that that the action is well brought. They will usually bring in the verdict "for single damages," and then the Ct will double them. If for no damages, the damages are taken to be common law damages.

Wilbur v. Kelly, 7 C.

## Trespass on things real.

Suppose a man suspects another of committing a trespass, by cutting trees &c, he may come before a justice, and if cleft does not acquit himself on oath, he is considered as guilty: This statute is now disused. The Cts have required some reason for the suspicion; and indeed probable cause for it is required to be shewn by the statute.

Trees, timber, wood, bark &c.

## Replevin.

The action of Replevin is one of those actions in which the title to land may be tried: though it is principally a personal action.

It is used in the case of replevying the goods or distresses of cattle, which have been impounded, or unlawfully taken. The [illegible] in [illegible] to recover the security, in [illegible] for damages, & shall then [illegible] against him.

To avoid a recovery against him, the owner of the cattle often admits the fact of seizing [illegible] but sets up a title (as in trespass) to the locus in quo. And then the title to the land is tried.

## Waste.

This action is one given to the reversioner against the tenant. It was formerly given only against those who were made tenants by act of law, as tenant in dower & by the curtesy &c. But by Stat. in Engd it has been extended to the case of other tenants, whether conventional or not. It appears to me, that we should receive the statutes, which can have an application to us, made in Engd before the emigration of our ancestors at least. (Our ancestors came to this country with certain [illegible] in & rather [illegible] were [illegible] as from the Engd common law. This is not [illegible] [illegible] [illegible] [illegible] conventional tenants.

# Waste.

[illegible] and suppose that the [illegible] [illegible] [illegible]
is [illegible] [illegible] to [illegible] [illegible]. [illegible]
must [illegible] [illegible] [illegible] [illegible]. Suppose
a woman [illegible] [illegible] [illegible] [illegible] [illegible] her
husband's real property which is wholly [illegible] and
she not is allowed to clear up timber? I think so.

This action of waste, is an action [illegible] given to the
owner of the inheritance, against those who have
possession of the estate. He who has [illegible] [illegible],
[illegible] 676 [illegible] 54 cannot maintain the action of waste.

[illegible] are not [illegible] [illegible] in this action the
[illegible] [illegible] [illegible], is in [illegible].

This action [illegible] against [illegible] for [illegible]
[illegible] 826. [illegible] the words "without impeachment of waste" or oth-
ers of similar import are inserted in the lease.

[illegible] an action of waste, the thing wasted and the
5 Com. 674. the damages are recovered.

Suppose the lessee assigns his lease; the assignee is
liable to all the covenants of the tenant in the lease;
[illegible] 9. and the latter is not discharged from his liabil-
ity by the obligation of the assignee.

[illegible] If the lessor sells his reversion, the purchaser has an
action of waste against the tenant, or assignee.

There are two kinds of waste; Voluntary and Per-
missive.

Permissive waste is any waste which strangers
have committed, even without the knowledge of the
tenant.

This rule, if it is manifest, bears extremely hard upon tenants in Dower, and dower, who have no power to provide against liability. Sir Edward Coke says they have a Fee on their Land, expending tenant in Dower. Abbot 229. 821. Co. 54. x requiring them to have the good order of it.

A form may be a fee, and cannot sit waste before she marries, and the action will extend to a second the husband and wife. Waste is considered as a wrong done. A woman can never be injured, without the husband, for any civil wrong whatever.

This action cannot lie against the exec^r of the tenant, who committed waste: because it is a tort — and an exec^r is never liable for the tort of his testator "actio personalis moritur cum persona." If the testator or exec^r received a benefit from the waste, an action may be sustained against the property from the exec^r on the ground of the assets being benefitted, but not as a tort.

The husband committing waste on land of which he will not inherit is unquestionably liable: but it is doubtful if the wife sues the husband is not liable: I apprehend this would be a mistaken decision. If the wife committed the waste and died, it would be true.

Tenant in tail after poss, is not liable to an action for waste though in truth he is nothing more than tenant for life. Neither is tenant pur autre vie — for the pos^n and of waste occasioning his estate and make him a trespasser.

There is no liability in any tenant who is under the contract without impeachment of waste."

An action of waste lies for the [illegible] against

5 Co. 54. the one in possession [illegible] as in the case of a

2 Rol. 822 [illegible] [illegible] [illegible]

[illegible]

If the waste was committed by a stranger

[illegible] 139. with permission from the lessor, though the lessee was the tenant would not be liable.

In order to maintain this action against the [illegible]

[illegible] [illegible] impermissible or [illegible]. The

2 Rol 829 remainderman must be the immediate ex-
Thom. 8.
[illegible] 688 pectant, to maintain this action.

The party bringing the action must have the inheritance

[illegible] 674 at the time of the waste committed. The heir, therefore, cannot bring the action for waste done in the time of the ancestor. It will be seen that the rule was founded on some principle which has since ceased.

Waste may be committed in houses, in gardens, and in lands & in the woods, and in timber. The duty of the lessee, commonly, is provided for in the contract. But suppose there is no contract between the persons who is to keep the leased premises in repair. By the common law it is the duty of the lessee. The practice is common for the lessor to do it. Now this practice is not known. The rule laid down is that the lessee must leave the house in as good a state as he received it.

# Waste.

[illegible] covenant [illegible] [illegible] as if the [illegible] [illegible] a [illegible] there would be a [illegible] [illegible] [illegible] the lessee [illegible] [illegible]. It is suffic<sup></sup>t if the lessee leaves the house as snug, and tight, to answer the purposes of keeping out wind & rain as properly as when he went into it.

If tiles or slattings are broken the lessee must repair it. If any destruction happens by a tempest or by other act of God, the lessee is not liable for this waste. But suppose the roof is taken off — and he suffers it to remain so, and the beams & rooms are injured, is he liable? There may be some nice questions on this point. Co. L. 53 [illegible] Moore [illegible] [illegible]

Suppose a lessee rebuilds a house pulling down the old one, better than the one he hired, it is waste, according to the old law.

So where a lessee altered the mill on a stream, from a grist mill, to a fulling mill it was held to be waste — though the fulling mill was much more profitable than the other. 1 Rol. 815. Co. L. 53. Hob. 234. 2 Rol. 415. 1 Lev. 309. [illegible]

There has been a revolution in opinion with respect to the right of a tenant to remove things which he had affixed to the premises for the purpose of carrying on his business. It was formerly thought that they could not be removed. Hence cider-mills were at that time commonly constructed on wheels, so that being personal property, they could be removed. But the law is now changed in the Salk. 368. [illegible] [illegible]

changed in this respect.

2. Co. 116. Moor. 67. Co. 53. Waste in lands, as by the cutting down of woods, or not keeping in repair mansion houses, fences, &c. Tenants are bound to repair in the land during their time, but if there were any places where there had been an absence made or quarries, the tenant may dig, without being guilty of waste; otherwise not.

2. Co. 83. Moor. 41. 5 Co. 12. 2. Mod. 97. Co. 53. This seems to rest on the same old principle that you must not break the terra firma, as it is considered that houses and cottages were not personal property.

Our decisions with respect to land as subject to waste, are liable to modern construction, even contrary to the decisions, though the value is enhanced by it, as when a barren tract is turned into a very valuable plantation.

2. Co. 124. Letting up new houses or enclosing other to make it worse, the land is not waste.

2. Co. 124. Bad husbandry is not waste.

Waste in timber is the cutting down any timber for any other purpose, than the necessary repairs, and to enjoy the profits of an estate; and this action can not be assignable.

Co. 53. Moor. 812. And the tenant may take fire-wood, plough-bote, &c. and he must not use for this purpose timber trees. Trees planted for shade, or ornament, cannot be cut down by the tenant.

# Waste

[illegible] 89.

[illegible] 2 Kel. 8 [illegible]

[illegible] 2 Kel. 8 [illegible]

Waste in Gardens &c. is the cutting down of fruit-trees, &c. such as lies in their grounds, or near adjoining to the house.

[illegible] 2 Kel. 8 [illegible]

[illegible] 2 Kel. 8 [illegible]

[illegible] 2 Kel. 8 [illegible]

Fruit-trees, or timber, are demanded to be cut down, or destroyed, in order to the improvement of land, or to prevent waste, and the [illegible] to cut down, [illegible] that.

[illegible] 2 Kel. 8 [illegible]

Fruit-trees, or timber, are demanded to be cut down, or destroyed, in order to the improvement of land, or to prevent waste, and the [illegible] to cut down, [illegible] that.

[illegible] 1 Com. 68

Where the owner is recalcitrant, or demand their fruit-trees, in order of the land is recovered.

[illegible] 2 Kel. 8 [illegible]

[illegible] 1 P. Wms. 528

[illegible] Vaughan

[illegible] 1 Rep. 204

[illegible] 3 Ath. 217

[illegible] 2 Rep. 3. 82

[illegible] 1 Vent. 52

[illegible] 3 Rep. 3. 64

[illegible] 14 Ch. 599. 535

[illegible] 1 Ch. 89

[illegible] Ambl. 167

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[illegible] 14 Ch. 599. 535

[illegible] 1 Ch. 89

[illegible] Ambl. 167

But they have again interfered in order where the waste was what they have called unreasonable waste. It has been so, when at the close of the term, tenant was going to cut down all the trees, & in the season, when they [illegible] ripened.

97.

Court of Chancery never Chancery claims the jurisdiction in this case.

When the legal owner of the estate is a tenant for another Court of Eq.ty will give an injunction against the commission of waste by the former.

So where, by a portion rule of law, where there is an intermediate remainder or reversion for life ~~in that~~ no action at law can be maintained by any one but Eq.ty will give an injunction against it.

Pl. Eq. Rep. 208

Pl. Eq. 170.

This Ct will also restrain the cutting down timber upon the ground in question pending the proceeding.

The estate also mortgaged in possession, is now equitable. The mortgagee may occupy till the mortgagor by a bill in Eq.ty to redeem, demanding the account by the mortgagee or waste.

Does the mortgagee make an interest that he may apply to Eq.ty for an injunction against the mortgagor? This depends entirely upon the intent of the security.

## Law of the land of Nuisance

A nuisance is not a crime, but it injures the civil property — but in this case under it did not do it one dead. It is supposed to be any thing done wrongfully to the hurt or annoyance of another property.

A public nuisance does not of itself imply special damage is occasioned by it give an action to an individual.

A nuisance is a consequential injury to property from some act. Here the action is for fair in the case and not trespass or assault.

Upon such principles, I do not see how an indictment will not lie against a man for placing a building so as to overhang the ground of another: "Cuius est solum, ejus est usque ad cœlum."

The obstruction of an ancient light is a nuisance. Lord Mansfield supposed 20 years would be sufficient to constitute ancient light. Falk 459

The exercise of an offensive trade in the vicinity of another house where there is no respite for doing it is a nuisance. Co Litt 57a § 9 Co. 58. Co Litt 30.

The erection of a stable near another dwelling, even if there was no occupiers for it, is a nuisance. It appears to be a consideration whether the person who creates the nuisance was aware of the place. The maxim is to be measured in the [illegible] may not be in being.

[illegible] is [illegible] on the [illegible] of [illegible] and the [illegible] of [illegible] [illegible] [illegible] [illegible] is not a nuisance.

Blackstone states, that if any person pursuing his rights to be convicted, as to injure the rights of others. The right of running this, although harmless in itself, if the right has been exercised, as a complaint [illegible] frequent pleadings, take this kind with the encumbrance.

Pl. Prot. 29.

No one has a right to divert a stream of water, from another land, "ultra [illegible] current."

But one may draw water, by cutting up a mill hole on the stream, if he turns it to it after he has used it, in its old channel.

Streams of water which, perhaps have been accustomed to run for the watering of their cattle, cannot lawfully be corrupted by the cutting up of a trade in that of a tanner which renders it unfit for use.

The interruption of streams is one of the most perfect causes of litigation.

The owner of the principal place, can not divert the stream so as to injure the person below, of a sufficiency for the use to which he has been accustomed, and for it.

The remedy will be in all cases so that every man shall be allowed to follow his inclination.

One person may have a freedom the right to follow a particular employment which will be interrupted by the setting up of a similar employment by another — if the right is one which concerns the public and is matter legislative care — such an interruption will be a nuisance; as in case of a fair.

Mr. Hilrath said the property of ancient towns was created at the first settlement of the country on condition of the burgesses keeping up a good mill. One another in nuisance to keep up another mill, so more as to take off a good part of his custom. It seems to fall within the same principle. I think as that which passes in the case of ferries, and other institutions of public utility. I know of no case which has been decided on that ground.

## Incorporeal Hereditaments.

A right of way may be personal merely, or it may be inheritable, and descend to the heir. In this right, I have already made which observations I have deemed necessary.

A right of fishery is one of great consequence. Every body has a right to fish on unappropriated waters — but they have no right to go upon other land to do so.

Right of fishery.

It was, as in Massachusetts, a common stock and a place for the purpose of fishing and passing and repairing vessels and the sea therein.

No one seen creating the right of fishing in a navigable river so as to impede the exercise of the creation right of navigation & commerce.

In consequence of the nature of the navigation and interest dams to counteract work when tide is up however may cause and pile it over the bank. But suppose there are shoals on the [illegible] in water between high and low water mark. It is settled that every person has a right to dig them.

Rents in the country, are generally upon a footing somewhat different from that in London. If a man leases land reserving an annual rent on the death of the lessee the rent goes to the land owner & lapses, viz. to the land.

An annuity is real property in a life, an estate for life or in perpetuity may be created.

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REEVE &
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